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APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

AUSTIN B. GRIFFIN, REPORTER.

VOLUME CXCIV.

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State of New York.

GERALD MORRELL, Respondent, *v.* BROOKLYN BOROUGH GAS
COMPANY, Appellant. (Appeal No. 1.)

Second Department, January 7, 1921.

Gas and electricity — suit to restrain gas company from enforcing increased rates imposed without authority of Public Service Commission — order granting injunction *pendente lite* affirmed and parties left to trial.

In a suit by a customer to restrain a gas company from enforcing rates claimed by said company to have been fixed by it, independent of the Public Service Commission after the statutory rate had been adjudged confiscatory, and to have such rates declared to be unreasonably compensatory and void, *held*, that an order of the Special Term granting an injunction *pendente lite* should be affirmed so that the issues arising between the parties may be determined by trial and not on affidavits.

BLACKMAR, J., and JENKS, P. J., dissent, with opinion.

APPEAL by the defendant, Brooklyn Borough Gas Company, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 27th day of September, 1920, granting an injunction *pendente lite*.

Defendant manufactures and sells gas in the thirty-first ward of the borough of Brooklyn. The complaint charged that notwithstanding the provisions of chapter 48 of the

Consolidated Laws regarding gas rates, the Public Service Commission of the State of New York for the First District, on July 2, 1920, had made and issued an order to defendant in the following terms:

"I. That the maximum price to be charged by the Brooklyn Borough Gas Company for gas shall be as follows:

"(a) On and after the date of this order, to and including July 31, 1920, \$1.15 per thousand cubic feet of gas sold and delivered consumers.

"(b) On and after August 1, 1920, to and including July 31, 1921, \$1.40 per thousand cubic feet of gas sold and delivered to consumers, except as hereinafter provided.

"II. That said Brooklyn Borough Gas Company be and it hereby is authorized and required not later than October 1, 1920, to change its standard from its present 22 candle power standard to the British Thermal Unit (B. T. U.) standard, the number of heating units to be furnished to be not less than 525 B. T. U.'s per thousand cubic feet of gas manufactured, distributed and sold, which British Thermal Unit standard is hereby fixed by the Commission."

The complaint set forth that such order was beyond the power of said Commission, in that it could not fix a rate in excess of the maximum allowed by statute, and that the one dollar and forty cent rate is unreasonable, excessive and exorbitant, and further that after such advance in rate it had no power to change the standard of quality fixed by the statute (Laws of 1906, chap. 125) to a British thermal unit standard of 525 heat units per 1,000 cubic feet.

It further alleged: "That the plaintiff is informed and verily believes that the said defendant threatens and is about to enter the plaintiff's premises to change the meter to conform to the rate of \$1.40 per thousand cubic feet. That should the plaintiff resist the officers and agents of the said defendant in so doing, and in any way endeavor to prevent the said trespass by physical force the said plaintiff will, under Section 66* of the Transportation Corporations Law of this State become liable to the payment of a heavy fine, besides suffering indignities to his person and damage to his property."

* *Sic.* See § 64.—[REp.]

Also that unless said order be declared invalid and nugatory, consumers of defendant's gas would institute a multiplicity of actions.'

There were also submitted affidavits of seven other consumers of gas furnished by defendant, who, uniting in plaintiff's prayer for injunction, asked plaintiff to sue for the benefit of each and all of them, under section 448 of the Code of Civil Procedure, to which plaintiff had assented, and thereupon he prayed that relief be granted also on behalf of such other persons.

The opposing affidavit sworn to August 2, 1920, by defendant's acting manager, referred to various proceedings in defendant's suit against the Public Service Commission, including a judgment entered on the report of former Justice HUGHES as referee on August 13, 1918, and further considered by this court in *Public Service Commission v. Brooklyn Borough Gas Co.* (189 App. Div. 62). After setting out the increasing cost of oil, the affiant concluded: "The rate of \$1.40 allowed by the Commission is less than a reasonable and compensatory rate under the new oil contract. The reasonable and compensatory rate would be at least \$1.55. Deponent attended all the public hearings held by the Commission preceding the order allowing \$1.40 maximum. The plaintiff was not present at any time and neither was any other consumer present."

Defendant's brief states that the argument was had on August fourth. At the final submission on August tenth, the acting manager presented a second affidavit verified on that day, which stated that "Defendant fixed a rate of \$1.40 for itself entirely independently of the permission to do so granted by the Commission order. On July 20, 1920, defendant, on its own authority, promulgated, fixed, made and established a rate of \$1.40 per 1000 cubic feet for all private consumers, to be charged and enforced on and after August 1st, 1920."

It stated that defendant had filed with the Commission schedules showing such rate, upon which "the Commission allowed the change of rate from \$1.15 to \$1.40 on August 1st, 1920, without requiring thirty days' notice and publication as also provided in said subdivision of said section."*

* See Public Service Commissions Law, § 66, subd. 12, as amd. by Laws of 1920, chap. 542.—[REP.]

An injunction (conditional on plaintiff's filing a bond for \$500 to pay any judgment against him) was granted, restraining defendant and its servants from entering plaintiff's premises to change the meter so as to increase the rate over that measured before August 1, 1920, also that defendant refrain from collecting from plaintiff any rate in excess of one dollar and fifteen cents per 1,000 cubic feet. (Reported *Morrell v. Brooklyn Borough Gas Co.*, 113 Misc. Rep. 65.) Defendant appealed to this court. When this motion for injunction was submitted, the defendant had not answered, but before it was granted defendant demurred to the complaint, which demurrer is the subject of the appeal in *Morrell v. Brooklyn Borough Gas Co.*, No. 3 (195 App. Div. 899).

Edward M. Bassett [*Wilson W. Thompson* with him on the brief], for the appellant.

Judson Hyatt [*John P. O'Brien, Corporation Counsel*, and *Gerald Morrell* with him on the brief], for the respondent.

PUTNAM, J.:

Ordinarily this court does not review the discretion of the Special Term in granting or refusing an injunction *pendente lite*, on appeal from the order, but will leave the parties to the trial. (*Smith & Sons Carpet Co. v. Ball*, 137 App. Div. 100; *Duryea v. Auerbach*, 164 id. 44; *Ginsburg v. Woolworth Co.*, 176 id. 882.) Here, however, are questions of law that seem to make an exception to the ordinary rule upon such appeals.

The powers of the Public Service Commission to sanction an increase of rate beyond that authorized by statute have always been restricted to the statutory rates. The original Public Service Commissions Law (Laws of 1907, chap. 429, § 72) conferred the rate-making power to fix the maximum price for gas by the words "within lawful limits." In the present act the matter was stated more clearly by an amendment inserting the term "not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished." (Consol. Laws, chap. 48 [Laws of 1910, chap. 480], § 72, as amd. by Laws of 1920, chap. 542.) In 1910, the date of the present law, improvements in gas production pointed to lower rates, and as

said by COLLIN, J.: "The Legislature evidently intended to retain unto itself the power of fixing rates exceeding those fixed as the greatest by statutes." (*People ex rel. Municipal Gas Co. v. P. S. Comm.*, 224 N. Y. 156, 166.) Last year Mr. Justice PAGE declared: "Experience has shown that the forecast of the future was at fault; that it would have been wiser and more in keeping with the purposes of the act as originally enacted if the power of the Public Service Commissions had not been thus limited." (*Bronx Gas & Electric Co. v. Public Service Comm.*, 190 App. Div. 13, 22.) Writing on December 19, 1919, possibly with an eye to the approaching legislative session, he added: "This court, therefore, expresses the hope that such limitation may be removed to the end that such flexibility be given to the operation of the statute that the Commissions may be open to the determination and adjustment of conflicting claims of consumers and the companies as to what are reasonable rates, fair both to the companies and to the public, at all times and under all circumstances, as was originally intended." (p. 22.) Although that court took the view that the Commission could authorize a gas rate above the statute maximum, the contrary has been decided in this department. (*Public Service Comm. v. Brooklyn Borough Gas Co.*, 106 Misc. Rep. 549; *affd.*, 188 App. Div. 935. See, also, 189 App. Div. 62, 67, 74.)

After the judgment entered on the Hughes report, the statute commanding the eighty-cent rate is unenforceable as to this particular defendant. (See Laws of 1906, chap. 125, as *amd.* by Laws of 1916, chaps. 604, 612, and Laws of 1917, chap. 666.) Yet such findings and the judgment thereon did not destroy the statute, which still exists as a restraint upon the Commission. And this rests on a sound distinction. To hold a rate confiscatory is merely a finding that as to a particular manufacturing plant the enforcement of a fixed rate with the conditions of gas production and distribution, would deprive the company of property without due process of law. (See U. S. Const. 14th Amdt. § 1; State Const. art. 1, § 6.) Such conditions are not merely those of operating cost and adequate return, but proof of such a fair and continued practical trial of the working of the existing rate that proves upon experiment its inadequacy.

But there is no similar way to enlarge the delegation of this rate-making power. The Legislature alone can do that. Courts cannot supply that which the Legislature has withheld. (*Matter of Quinby v. Public Service Comm.*, 223 N. Y. 244, 264.) Doubtless this was the view that led to the defendant's second affidavit in which it took a final stand wholly independent of the Commission.

Had it been otherwise, and this advance been regularly made under section 72 of the Public Service Commissions Law, the proper remedy would be by certiorari, and not by this form of equity suit. But the rate of one dollar and forty cents is now acknowledged as an independent increase. Such advance deserves that full investigation that can only be had through a trial. We cannot say that it was any error of discretion to preserve the *status quo*, where the defendant is fully protected by security. Even if plaintiff sued entirely alone, he would have a standing to contest the exaction of rates which are unfair or discriminatory. (*Armour Packing Co. v. Edison El. Illuminating Co.*, 115 App. Div. 51; *Richman v. Consolidated Gas Co.*, 114 id. 216.) We, therefore, do not depart from the ordinary practice to leave the parties to a trial, rather than to dispose of these doubtful questions upon affidavits.

The order, therefore, should be affirmed, with ten dollars costs and disbursements.

MILLS, J., concurs; BLACKMAR, J., reads for reversal, with whom JENES, P. J., concurs.

KELLY, J.:

I concur in the affirmance of the order granting injunction *pendente lite* but for reasons which are not entirely in accord with those expressed in the prevailing opinion. In view of the fact that the statutory rates fixed for defendant by the Legislature have been declared confiscatory and void, I think the power to fix a reasonable rate devolved upon the Public Service Commission after due hearing and investigation. I think this was the intention of the Legislature in such case. (*People ex rel. Village of S. Glens Falls v. P. S. Comm.*, 225 N. Y. 216.) The consumers of gas were not left solely at the mercy of the defendant company. (*Town of North Hempstead*

v. *Pub. Serv. Corp.*, 193 App. Div. 224; *Bronx Gas & Electric Co. v. Public Service Comm.*, 190 id. 13.) It is the expressed policy of the State that the charges made by these public utility corporations shall be subject to supervision. But there appears to be some confusion of opinion as to the effect of the decision of the Court of Appeals in *People ex rel. Municipal Gas Co. v. P. S. Comm.* (224 N. Y. 156), and it is also said that the judgment in the case tried before Judge HUGHES determined that the Public Service Commission was without power to fix rates. (*Public Service Comm. v. Brooklyn Borough Gas Co.*, 189 App. Div. 62, 72.) On the other hand, the gas company defendant in the case at bar made its application to the Public Service Commission for the rates complained of here by permission of the Appellate Division in the First Department. (*Brooklyn Borough Gas Co. v. Public Serv. Comm.*, 190 App. Div. 901.) Out of this confused situation arises the controversy between the plaintiff and defendant here. I would doubt the correctness of the order appealed from were it not for the fact that the printed papers show that before the learned judge at Special Term the defendant gas company in the affidavit of its manager appeared to concede that the Public Service Commission had no authority to fix the rate, and in its points before this court there is a like concession. And the gas company appears to rely upon rates fixed "entirely independently of the permission to do so granted by the Commission order. On July 20, 1920, defendant, on its own authority, promulgated, fixed, made and established a rate," etc. I cannot agree that the defendant had such authority. In my opinion the situation presented in the papers requires the affirmance of the order granting the preliminary injunction so that the rights of the parties may be established by prompt trial.

MILLS, J., concurs.

BLACKMAR, J. (dissenting):

The complaint alleges that the Public Service Commission has made an order that on and after August 1, 1920, to and including July 31, 1921, the maximum price to be charged by the defendant for gas shall be one dollar and forty cents per

1,000 feet for gas sold and consumed, except that the defendant is authorized, not later than October 1, 1920, to change the standard of quality. As the action was brought before this last-mentioned date, the change of standard is not before us. The complaint goes on to allege in substance that the order of the Public Service Commission is void; that the rate prescribed by statute has been adjudged confiscatory and void as to defendant; that defendant is attempting to put the rate prescribed by the Public Service Commission in force, and that the rate is unreasonable and unduly compensatory to defendant. There is a demand for a judgment which if granted will affect the schedule of rates to all defendant's consumers.

It is claimed that the decision of the Court of Appeals in *People ex rel. Municipal Gas Co. v. P. S. Comm.* (224 N. Y. 156) establishes as matter of law that the order of the Public Service Commission is void in that it authorizes a charge in excess of the rate fixed by statute, and may be disregarded in a collateral attack. That decision was rendered in a case where there was a statutory rate fixed and in force, and the court held that the power of the Public Service Commission was limited, by the terms of the statute conferring it, to fixing rates below the statutory limit. But in the case at bar it appears on the face of the complaint that in a suit in equity the statutory rate has been adjudged confiscatory and void as to this defendant. Undoubtedly, as is said in the prevailing opinion herein, the statute still exists; but the effect of the judgment is that it is void as to the defendant. Such being the case, I think that the decision in the *Municipal Gas Company* case does not apply. If it does, we are driven to the conclusion that, as to the defendant, the whole comprehensive plan of State control of rates through the Public Service Commission has broken down. It is not necessary so to hold; it is inconsistent with the declared policy of the State so to hold; and in my opinion it is error so to hold.

In order to hold that the Commission had power to fix the rate in question it is not necessary to do violence to the words of the statute. I proceed within its letter. The statute empowers the Commission to fix the maximum price of gas "not exceeding that fixed by statute to be charged by such

corporation." (Public Service Commissions Law, § 72, as amended by Laws of 1920, chap. 542.) Since the rate of eighty cents has been declared confiscatory and the court has adjudged that it is not applicable to this defendant, there is no price fixed by statute to be charged by the corporation.

But whatever we may think of the power of the Commission to fix a rate in excess of eighty cents, yet the Commission had general jurisdiction over the defendant company and over the subject-matter. It certainly had power to fix a rate within the limits of the statute. If it was not warranted in exceeding eighty cents, this was an error in law and should be corrected by certiorari. The Public Service Commissions Law presents a comprehensive plan whereby all questions of reasonableness of charges of public service corporations where the Legislature has not directly acted, shall be settled by Commissioners whose special knowledge in this field of operation and whose facilities for investigation render them more fitting depositories of that power than the courts. Their decisions may be directly reviewed by certiorari. But they cannot be attacked collaterally unless entirely void as beyond the power of the Commission. If I am right, the Public Service Commission, which fixed the price in question acted within its general jurisdiction, and if, contrary to my opinion, it erred as fixing too great a rate, that should be corrected by direct review and not disregarded as void.

The subject-matter of this action concerns the charge to the plaintiff alone. He does not represent the public and can raise no question of the validity of the general schedule of charges. As has been seen, this power has been conferred upon the Public Service Commission. The allegation of his complaint is that the rate is "unreasonable, excessive and exorbitant, and is more than sufficient to reasonably compensate the said defendant for its public service during a period when commodities necessary to comfortable existence should be furnished to the consumer at as low a rate as possible." He prays, among other things, "That it be decreed that the rate of \$1.40 per thousand cubic feet for illuminating gas is, as to this defendant, unreasonably compensatory and void." It is manifest that the claim of the plaintiff is that the defendant is making too much money. But with this the plaintiff has no

concern. As between the plaintiff and the defendant the only question is whether one dollar and forty cents per 1,000 cubic feet is unreasonable for the service rendered. Whether it is compensatory to the defendant is not the issue. That inquiry is pertinent only when a public service corporation claims that a rate fixed by statute or by the Commission is confiscatory. An essential element of such inquiry is whether the statute permits reasonable compensation to the corporation, which naturally involves the financial return to the company in its operation under the prescribed rate. Between the individual and the company no such questions arise. (*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas. 723.) In the *Cotting* case Mr. Justice BREWER quotes from the English case (*supra*, 96), as follows: "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged."

Prescribing a general rate for service is a legislative and not a judicial act. It may be exercised by the Legislature directly or by an administrative body to which the power is delegated. In the absence of such regulation, the power to fix the charges is vested in the corporation itself; and although a question may arise as to the reasonableness of the charge, depending upon the service rendered, as between an individual and the corporation, such power never concerns the power of the corporation to establish a system of rates. In the absence of such legislative regulation, the courts have no power to determine the question. (*People ex rel. Linton v. B. H. R. R. Co.*, 172 N. Y. 90; *Honolulu R. T. Co. v. Hawaii*, 211 U. S. 282; *Northern Pacific Railroad v. Dustin*, 142 id. 492; *People v. N. Y., L. E. & W. R. R. Co.*, 104 N. Y. 58.) The bill of complaint, concerning the plaintiff's rights only, furnishes no justification for this suit in equity.

If the order of the Public Service Commission is void, the defendant has the power to establish its own rates. The presumption is that they are reasonable, and a mere allegation of the pleadings that they are unreasonable, without evidence to support it, does not justify an injunction. In this record there is not a scintilla of evidence tending to show that the

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rates are unreasonable, and yet the court at Special Term has upon this record granted an injunction and exercised legislative functions of prescribing a maximum rate, so substituting its judgment for that of the Public Service Commission and the defendant.

I think the order should be reversed and the motion denied.

JENKS, P. J., concurs.

Order affirmed, with ten dollars costs and disbursements.

JAMES E. HARRITY, Appellant, *v.* HENRY STEERS and JAMES RICH STEERS, Respondents.

Second Department, January 7, 1921.

Landlord and tenant — action for services in procuring tenant — complaint alleging production of tenant ready, able and willing to execute lease good against demurrer.

In an action to recover for services in procuring a tenant for the defendant, the complaint, alleging that the plaintiff produced a tenant able, ready and willing to execute a lease, is good against a demurrer, since the allegation may be construed to mean one ready, willing and financially able to perform the lease.

APPEAL by the plaintiff, James E. Harrity, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 28th day of October, 1920, granting defendants' motion for judgment on the pleadings.

John J. Fitzgerald, for the appellant.

Wilson B. Brice [*Charles Thaddeus Terry* with him on the brief], for the respondents.

JENKS, P. J.:

It is *possible* that the contract contemplated services by the plaintiff which were *complete* when he presented a tenant able, ready and willing to execute a lease, irrespective of his financial ability. If so, then the complaint is good against the demurrer.

The rule of strictness against the pleader has been greatly modified. (Code Civ. Proc. § 519; *Kain v. Larkin*, 141 N. Y. 144, 150; *Crotty v. Erie Railroad Co.*, 149 App. Div. 262; *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 457; *Troy Automobile Exchange v. Home Ins. Co.*, 221 id. 58.) I think that if we assume that the contract contemplated the financial ability of the proposed tenant to perform the lease, the pleading can be sustained against the demurrer. The word "able" may be construed as relative to the financial power of the tenant. In *Richardson v. Bricker* (7 Colo. 58) it is said that the words "when able," "of course the expression must be construed as referring to financial ability." "To execute" may be equipollent to "to perform." "F. *executer*; L. *ex-sequi*, to follow out, follow to the end, perform." (Anderson Law Dict. 429, n.; Rawle's Bouvier Law Dict. "Execute;" Century Dict. "Execute," 3 (b).) It may mean "to fulfil" or "to complete." (*Den v. Young*, 12 N. J. Law, 303.) Thus we may paraphrase fairly, one ready, willing and financially able to perform the lease.

The order is reversed, with ten dollars costs and disbursements, and the motion is denied, without costs.

MILLS, BLACKMAR, KELLY and JAYCOX, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, without costs.

HENRY R. ASSERSON, Appellant, v. THE CITY OF NEW YORK,
Respondent.

Second Department, January 7, 1921.

Trial — motion after dismissal of complaint to open case and introduce new evidence.

Where in an action by the assignee of a contractor to recover the amount unpaid on a municipal contract, an application by the plaintiff after the dismissal of the complaint to open the case and introduce in evidence the engineer's certificate was denied, and it appears that if said application had been granted the question as to whether or not the defendant was justified in retaining the whole or a part of the contract price as liquidated

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damages for delay in the performance of the work, the only issue litigated in the case, could have been determined, the judgment dismissing the complaint and the order denying the plaintiff's motion to set aside said dismissal should be reversed and a new trial granted, although the granting or refusing of the plaintiff's application to open the case and introduce new evidence rested in the discretion of the trial justice.

APPEAL by the plaintiff, Henry R. Asserson, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 18th day of February, 1919, upon the dismissal of the complaint by direction of the court at the close of plaintiff's case, and also from an order entered in said clerk's office on the 11th. day of February, 1919, denying a motion to set aside the dismissal of the complaint and for a new trial made upon the minutes.

The action was brought by the assignee of a contractor to recover the amount unpaid upon the contract price for work performed under a contract with the city. The performance of the work was conceded; the amount due the contractor under the contract price was not disputed; but the city deducted from the face of the contract price the sum of \$4,787.50 for liquidated damages for delay in the performance of the work. The issue litigated was whether the city had the right, under the terms of the contract, to deduct this amount for damages for delay.

Howard G. Wilson [*John C. Wait* with him on the brief], for the appellant.

William R. Wilson [*John P. O'Brien, Corporation Counsel*; and *William B. Carswell* with him on the brief], for the respondent.

BLACKMAR, J.:

The plaintiff, as his complaint was formulated, assumed the burden of showing that the engineer's certificate, in accordance with which it was alleged that the city had deducted the penalty for delay, proceeded upon a misconstruction of the terms of the contract and was in certain respects unreasonable and arbitrary. The plaintiff introduced much evidence tending to show that his assignor was entitled to be credited with certain delays, and in two particulars, without considering them all, he

was correct. There was evidence tending to show that the change in the method of tamping the work, from ramming to flooding, and the change in the plan by eliminating the by-pass at Utica avenue, was, notwithstanding the letters that were introduced in evidence, made at the instance of the defendant, and that these changes caused delay in the final completion of the contract. As the evidence then stood, the jury might have found that the delay could not be charged to the contractor, and if the engineer's certificate did not give the contractor credit therefor, to that extent it did not conclude the plaintiff. The difficulty with the plaintiff's case, when he rested, was that the engineer's certificate had not been introduced in evidence. It was, therefore, impossible to determine whether or not the certificate was erroneous in this respect. When the plaintiff had rested his case, and the motion was made to dismiss, and the court had announced that the motion was granted, the question of the absence of the engineer's certificate was raised and was one of the causes assigned by the defendant for the dismissal of the complaint. The plaintiff's counsel thereupon offered to introduce the certificate in evidence. The trial justice denied his motion on the ground that the complaint had already been dismissed. Although granting or refusing an application to open the case and introduce new evidence rested in the discretion of the trial justice, yet we think the application should have been granted. If it had been granted and the certificate received in evidence, an intelligent disposition of the case could have been made and it could have been determined whether or not the defendant was justified in retaining the whole or a part of the contract price as liquidated damages for delay in the performance of the work.

I, therefore, recommend that the judgment and order be reversed and a new trial granted, with costs to abide the event.

JENKS, P. J., RICH, KELLY and JAYCOX, JJ., concur.

Judgment and order reversed and new trial granted, with costs to abide the event. Settle order before Mr. Justice BLACKMAR.

TINA TEPLITZ, Appellant, v. IRVING I. BLOOMINGDALE and Others, Individually and as Copartners, Doing Business under the Name of BLOOMINGDALE BROS., Private Bankers, Respondents.

Second Department, January 7, 1921.

Banks and banking — recovery of penalty prescribed by Banking Law, section 114, for exaction of interest in excess of six per centum — judgment in prior suit for accounting not *res adjudicata* — maintenance of prior suit for accounting not an election of remedies.

The penalty prescribed by section 114 of the Banking Law for the exaction of interest in excess of six per centum per annum can be recovered only in an action expressly brought for that purpose, and, therefore, a judgment in a prior suit for an accounting between the parties is not *res adjudicata* nor did the plaintiff by bringing such suit elect to have the issue decided therein.

APPEAL by the plaintiff, Tina Teplitz, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 22d day of October, 1920, overruling plaintiff's demurrer to the separate defenses contained in defendants' answer.

Leopold Klinger [*Morris Grossman* with him on the brief], for the appellant.

James Leslie Pinks, for the respondents.

BLACKMAR, J.:

This action is brought against the defendants, who are private bankers, to recover the penalty prescribed by section 114 of the Banking Law for the exaction of interest in excess of six per centum per annum.

The complaint alleges that the plaintiff and the defendants entered into corrupt agreements in writing to enable the defendants to exact more than six per cent interest on certain advances made to the plaintiff; that the advances were made, and that the defendants exacted and received from the plaintiff an amount of interest aggregating fifteen per cent per annum and amounting to the sum of \$1,971.17. Judgment is

demanded for twice that sum pursuant to the provisions of said section of the Banking Law.

To this complaint the defendants interposed an answer containing affirmative defenses. The plaintiff demurred to the defenses as insufficient in law upon the face thereof. The demurrer was overruled and the plaintiff appeals.

The first affirmative defense is that the subject of the action has been already adjudicated. The answer alleges that on the 31st of October, 1919, the plaintiff brought an action against the defendants for an accounting, based upon the said agreements and the operations of the parties thereunder; that a defense to said action was interposed and the case came on for trial which resulted in a judgment that the accounts between the parties showed an overpayment by the defendants to the plaintiff; and that the plaintiff was not entitled to any money judgment against the defendants. The answer further alleges that the said judgment is based upon a finding of fact that the contract aforesaid was intended to be performed and was performed by the parties substantially in accordance with its provisions, and that the commissions and charges, which under the terms of the contract the defendants were entitled to charge, were intended to be so charged and received as compensation to the defendants for doing the work provided for in the agreements and to cover the defendants' expenses in connection therewith. Then follows an allegation that the judgment so set forth is a prior adjudication of the cause of action set out in the plaintiff's complaint, and a bar thereto.

The point of the demurrer is that the penalty provided for in section 114 of the Banking Law can be recovered only in an action expressly brought for that purpose, and in no other way, and that, therefore, the prior case, which settled the accounts between the parties, was not an adjudication against the plaintiff's right to recover the penalty for the alleged overcharge of interest which was included in the accounting between the parties.

Section 114 of the Banking Law prohibits any bank or any private or individual banker from taking more than six per cent interest. It provides that the knowingly taking, receiving, reserving or charging of a larger amount shall be adjudged a forfeiture of the entire interest; and that if a greater rate of

interest has been paid, the person paying the same, or his legal representatives, may recover twice the entire amount of the interest if the action to recover the same is brought within two years from the time the excess of interest was taken. Then follows a provision that the true intent and meaning of the section is to place and continue such banks and bankers on an equality with the national banks under the act of Congress.

The United States Supreme Court, in *Barnet v. National Bank* (98 U. S. 555), held that where a national bank brought an action against the parties to a bill of exchange, the defendants could not set up, by way of counterclaim or setoff, that the bank knowingly took and was paid a greater rate of interest than that allowed by law. Mr. Justice SWAYNE in that case said: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties."

The question came before the Court of Appeals in *Caponigri v. Altieri* (165 N. Y. 255), in which it was held that as the intent of the statute was to place all banks and private and individual bankers on a parity with the national banks, this decision of the United States Supreme Court was the law and must be followed by the Court of Appeals.

It is obvious that an action for an accounting to determine the rights of the parties upon the written instrument does not present the same issue as an action for the penalty prescribed by section 114 of the Banking Law. It is true that the answer in this case alleges that the judgment on the accounting is based upon a finding that the amount exacted by the defendants was in reality what it purported to be — compensation for services rendered. The contracts gave the defendants the right to exact this sum of money. The statute gives no defense to this, for section 114 of the Banking Law relieves banks and bankers from the liabilities and penalties of the usury laws. It is a matter of indifference in the accounting action whether the payments exacted by

the defendants were compensation for services or a cover to enable the defendants to secure more than six per cent interest. The only remedy the law prescribes for the exaction by bankers of a greater rate of interest than six per cent is the penalty under section 114^m of the Banking Law. If this penalty could not be enforced as incidental to an action for an accounting, and this seems to be the spirit and intent of the decisions already referred to, these findings on this subject are irrelevant and cannot estop the plaintiff. If the interest is still unpaid, there is a remedy on the adjustment of the accounts between the parties (*Carnegie Trust Co. v. Chapman*, 153 App. Div. 783); but the complaint contains an allegation that the interest has been exacted and paid to the defendants. The only remedy that the plaintiff had, according to the decisions, was a direct action for this double amount of interest as a penalty. This could not be adjudicated as incidental to an action in equity to settle the accounts between the parties, and, therefore, the decree in that action is not a bar.

The second defense pleads practically the same matter on the theory that the plaintiff elected to have this issue decided in the accounting case. If the claim to enforce this penalty could not be asserted as incidental to an action for an accounting, the plaintiff does not and cannot elect to have it so decided by bringing the action in equity for an accounting. The courts have held in substance, I think, that the question of a penalty cannot be involved in such action, and, therefore, the judgment in that case is not *res adjudicata* on the question of this liability for the penalty, nor does the plaintiff, by bringing an action for an accounting, elect to have it so involved.

The order should be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with ten dollars costs.

JENKS, P. J., MILLS, RICH and JAYCOX, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs.

ELSIE WOERZ, an Infant, by HEINRICH WOERZ, Her Guardian ad Litem, Respondent, v. HATTIE ROSENFELD and GERTRUDE MANDEL, Appellants, Impleaded with AUGUSTA ISENBERG, Defendant.

First Department, December 3, 1920.

Master and servant — negligence — action by child of janitress of apartment house to recover for injuries received in operating dumbwaiter — employment without knowledge of landlord and in violation of Labor Law.

The defendants, owners of an apartment house, were not liable to the plaintiff, an infant, for injuries received in operating a dumbwaiter where it appeared that the plaintiff's mother was the janitress of the house and that she and her husband alone were authorized to operate the dumbwaiter in the basement for the purpose of removing garbage for the various tenants; that the defendants had no knowledge that said plaintiff was permitted to perform that work, and that the Labor Law forbids a child to work in connection with an apartment house.

The mother in delegating her duties to the child acted outside the scope of her authority, and for damages arising from such unauthorized act the principals cannot be held liable.

APPEAL by the defendants, Hattie Rosenfeld and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Bronx on the 6th day of December, 1919, upon the verdict of a jury for \$7,500, and also from an order entered in said clerk's office on the 19th day of December, 1919, denying said defendants' motions to set aside the verdict and for a new trial in an action against defendants as owners of an apartment house for personal injuries alleged to have been received by the plaintiff on the premises aforesaid due to the negligence of the defendants.

William Dike Reed, for the appellants.

J. A. Goodwin of counsel [*Leonard F. Fish* with him on the brief], *Thomas J. O'Neill*, attorney, for the respondent.

GREENBAUM, J.:

Plaintiff at the time of the accident on January 7, 1916, was nine years, eleven months old. Her mother was the janitress of the apartment house in question. While using and manipulating a dumbwaiter in the rear of the cellar, which was a considerable

distance removed from the living quarters of her parents, the plaintiff was seriously injured. The evidence is undisputed that the accident occurred in the performance of work in assisting her mother, who with her husband alone was authorized to use the dumbwaiter in the cellar in order to remove garbage for the various tenants in the house. In other words, the child was injured while engaged in removing garbage cans for the tenants, a duty which devolved upon her parents. Defendants had no knowledge whatever of the fact that the plaintiff was permitted to perform any such work. The Labor Law (§§ 161, 162, as amd. by Laws of 1915, chap. 386, and Laws of 1911, chap. 866) forbids a child under the age of fourteen years to work in connection with an apartment house. Besides, the mother in delegating her duties to the child acted outside of the scope of her agency. For such an unauthorized act on the part of the mother the principals cannot be held liable. The facts disclosed upon the trial bring the case clearly within the rule applied in *Goldberg v. Borden's Condensed Milk Company* (185 App. Div. 222; *affd.*, 227 N. Y. 465) and *Rolfe v. Hewitt* (*Id.* 486).

The judgment must be reversed and the complaint dismissed, with costs and disbursements.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ., concur.

Judgment and order reversed, with costs. Complaint dismissed, with costs.

LEO FINKENBERG, INC., Respondent, v. CROMPTON BUILDING CORPORATION and Others, Defendants.

HARRIS A. ROHTMAN, Appellant.

First Department, December 3, 1920.

Contempt — refusal of witness to testify before referee appointed to take deposition — order of reference granted before summons served.

A witness is not guilty of contempt by refusing to testify before a referee appointed to take his deposition where the order of reference was granted and the refusal to testify took place before the complaint was verified and the summons served, for at the time of said refusal an action was not pending within the meaning of section 753 of the Judiciary Law.

APPEAL by Harris A. Rohtman from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of May, 1920, granting the plaintiff's motion that Harris A. Rohtman be adjudged in contempt of court and fining him the sum of \$303.80, and also from an order entered in said clerk's office on the 22d day of March, 1920, denying the appellant's motion to vacate an order for the appointment of a referee to take his deposition to be used upon a motion.

Elijah N. Zoline, of counsel [*Henry W. Fried*, attorney], for the appellant.

Isaac N. Jacobson of counsel [*Samuel I. Goldberg*, attorney], for the respondent.

GREENBAUM, J.:

On February 16, 1920, an *ex parte* order was signed for the appointment of a referee to take the deposition of the appellant as a witness to be used in an action which had not then been commenced by the respondent against the Crompton Building Corporation and another, and on the same day a subpoena was issued to and served upon the appellant to appear before the referee on February 18, 1920, on which day the hearing was adjourned to February 21, 1920. The order of reference was based upon the affidavit of the attorney of the plaintiff, from which it appears that the summons and complaint had not been served up to February 16, 1920. The complaint was not verified until February 24, 1920. As matter of fact there was no action pending on February 21, 1920. When the appellant attended before the referee on February 21, 1920, he objected to being sworn upon the ground that there was no pending action and, therefore, no power in the court to compel him to testify. On February 25, 1920, he moved at Special Term to vacate the order of reference upon the same grounds as urged before the referee, but that motion was denied. The learned court in a brief memorandum based its denial upon *Wallace v. Baring* (2 App. Div. 501) and *Allen v. Mayer* (73 N. Y. 1).

In *Wallace v. Baring* (*supra*) the record on appeal shows

that as matter of fact the referee was appointed a considerable time after the action had been commenced and the summons served on one of the defendants.

Allen v. Mayer (supra) was an action in which a warrant of attachment had been granted. The motion to vacate the attachment was based upon the ground that the Court of Common Pleas of the City of New York had not acquired jurisdiction to grant the warrant, "for the reason that the summons had not been served, the defendant not being a resident of the city." Said the court: "This would be a good point but for the provisions of the Code (*Kerr v. Mount*, 28 N. Y. 659). The Code, section 227,* which authorizes the issuing of an attachment and provides that 'for the purposes of this section an action shall be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days.'"

The court thus upheld the jurisdiction of the court upon the ground that in that case an action had been commenced by the issuance of the summons under the Code provision above quoted and treated the action as a pending one within the contemplation of law.

The case at bar is not concerned with an application for an attachment. There is nothing stated in section 885 of the Code of Civil Procedure under which the order of reference was ostensibly granted, which would indicate that such an order may be made in other than a pending action. Moreover, section 753 of the Judiciary Law, which re-enacted section 14 of the Code of Civil Procedure, relating to contempt proceedings, provides: "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court, may be defeated, impaired, impeded, or prejudiced, in either of the following cases," among which is the refusal of a witness to be sworn. (Subd. 5.) This, however, was not an action pending in this court when the order of

* See Code Proc. § 227, as amd. by Laws of 1866, chap. 824, and Laws of 1875, chap. 28.—[REF.]

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reference was signed nor when the alleged disobedience of the witness before the referee took place.

Under the circumstances the order appealed from, granting plaintiff's motion that the witness be adjudged guilty of contempt of court, must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs; and the order denying defendant's motion to vacate the order appointing a referee reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,
concur.

Order granting plaintiff's motion reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs; order denying defendant's motion reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

In the Matter of the Application of HAZELWOOD OIL COMPANY,
Appellant, for a Writ of Certiorari to Review the Assessment
of Its Property in the Town of Allegany, New York.

ASSESSORS OF THE TOWN OF ALLEGANY, NEW YORK,
Respondents.

Fourth Department, December 22, 1920.

**Taxation — oil wells leased by foreign corporation are real property
for purposes of taxation.**

Oil wells on leased land are assessable as real property against the lessee, a foreign corporation, and when the Legislature provided by section 39 of the General Construction Law that oil wells on leased land should be deemed personal property for all purposes except taxation, it was intended that for such purposes they should be regarded as real property.

Section 39 of the General Construction Law was not repealed or superseded by chapter 726 of the Laws of 1917, applicable to foreign corporations, since that statute has application only to machinery used for trade or manufacture situate in a building, structure or superstructure.

APPEAL by the relator, Hazelwood Oil Company, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of

Cattaraugus on the 22d day of September, 1920, confirming the report of the referee in certiorari proceedings to review the action of the assessors of the town of Allegany, and also from a final judgment entered in said clerk's office on the same day, confirming the assessments and dismissing the petitions for the writs of certiorari.

Allen J. Hastings, for the appellant.

W. C. Overton and *Creighton S. Andrews* [*Creighton S. Andrews* of counsel], for the respondents.

HUBBS, J.:

The relator, the Hazelwood Oil Company, is a foreign corporation engaged in the oil and gas business in this State. It holds an oil lease of a farm of 268 acres in the town of Allegany, Cattaraugus county, upon which it has forty-nine oil wells. The lease provides that it is "for the sole and only purposes of mining and excavating for petroleum, coal, rock or carbon oil, or other valuable mineral or volatile substances." The lease provides that the lessor shall "fully use and enjoy the said premises for the purposes of tillage, except such part as shall be necessary for said mining purposes," the lessee to have "the right to remove any machinery or fixtures placed on said premises" by it. The lease was extended and enlarged by an instrument under seal which extended the said lease for a period "as long as oil shall be found in paying quantities on the leased premises."

The assessors of said town assessed said oil wells as real estate. The relator brought these proceedings to review such assessments. In written objections filed with the assessors of said town and in the petitions herein the relator objected to the assessments "upon the ground that said assessment is *wholly* illegal and erroneous in that it is in violation of the provisions of Chapter 726 of the Laws of 1917 of the State of New York."

The position of the relator is that it is not subject to any tax on real property in said town, because its property is personal property wholly exempt from local taxation for the reason that the relator is a foreign corporation and as such liable to a tax under chapter 726 of the Laws of 1917, known as the Emerson Act. No objection is made to the form or

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amount of the assessment. It is not claimed that the assessment should be reduced, or that any items should be stricken out, but it is urged that it is wholly void.

The only question which we have to determine is whether oil wells situate on the lands leased can be legally assessed by the local assessors as real property against the lessee, a foreign corporation.

Prior to the enactment of chapter 372 of the Laws of 1883 there was great confusion in the cases upon the question of the status of oil well properties. (*Buck v. Cleveland*, 143 App. Div. 874; *Wagner v. Mallory*, 41 id. 126; affd., 169 N. Y. 501.) Chapter 372 of the Laws of 1883 was undoubtedly enacted to settle the law. It read as follows: "All oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation, but nothing herein contained shall affect the laws now in force relating to taxation." This law was re-enacted in the same form as section 39 of the General Construction Law, except that the following clause was left out in the re-enactment: "but nothing herein contained shall affect the laws now in force relating to taxation." Since the enactment of chapter 372 of the Laws of 1883, oil well properties have been treated as personal property for all purposes except for the purposes of taxation, and also except in cases where they have been classed as real property by statute for some specific purpose, as in section 2 of the Lien Law (as amd. by Laws of 1916, chap. 507).

It was said in the case of *Wagner v. Mallory* (169 N. Y. 501), in referring to chapter 372 of the Laws of 1883: "The Legislature had the power to determine and define the character of property and specify whether it should be regarded in the future as real or personal." We think that when the Legislature provided by statute that oil wells on leased land should be deemed personal property for all purposes except taxation, it intended that for purposes of taxation they should be regarded as real property. That was the construction placed upon that statute in actual practice, and it seems to have been the uni-

form practice to tax such properties as real property. We think that such practice was proper.

In 1917 the Legislature passed an act taxing certain corporations for the privilege of doing business in this State, and said act exempted the personal property of such corporations from local taxation. (Tax Law, art. 9-A, §§ 208-219-1, added by Laws of 1917, chap. 726, and Laws of 1918, chap. 271, as amd.) Section 219-1 of the Tax Law (added by Laws of 1918, chap. 271, as amd. by Laws of 1919, chap. 628) reads as follows: "The term 'personal property,' for the purposes of the exemption from assessment and taxation thereon locally as granted by section two hundred and nineteen-j of this chapter,* shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto. The term 'personal property,' as used in such section, shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential."

It is urged by the appellant that even if oil well property was properly assessed prior to the enactment of chapter 726 of the Laws of 1917 as real property, that statute, and the amendments thereto, which define personal property for the purposes of that act and exempt it from assessment for local tax purposes by the assessors, supersedes the general statute (Gen. Const. Law, § 39) and nullifies judicial decisions as to the character of such property for the purpose of taxation. We are unable to agree with such conclusion. We see nothing in that section to include oil wells and machinery. It refers to machinery used for trade or manufacture situate in a building, structure or superstructure. In *People ex rel. Citizens' Gas Light Co. v. Board of Assessors, etc.* (39 N. Y. 81) it was held that under a statute which affected things erected upon or affixed to land, mains of a gas company laid underground were not included. Similarly, this statute, which refers to things in

* Amd. by Laws of 1918, chap. 271, and Laws of 1919, chap. 138. Since amd. by Laws of 1920, chaps. 113, 640.—[REP.]

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a building, structure or superstructure, must not be extended beyond the limit of the class of property which the Legislature meant to include. While the statute in question might change the status of things of the class specified, it cannot be extended to include things of a different class.

The conclusion reached makes it unnecessary to discuss separately the cases which were reviewed together. The judgment and order should be affirmed, with costs.

All concur.

Judgment and order affirmed, with costs.

In the Matter of Proving the Last Will and Testament and
Codicil Thereto of EDWARD LAWLER, Deceased.

FIRST TRUST AND DEPOSIT COMPANY, Respondent; JULIA
LAWLER LAMBE and Others, Appellants.

Fourth Department, December 22, 1920.

Wills — probate — jury trial as to due execution — error to take case from jury where evidence conflicting as to execution — execution of codicil does not vivify defectively executed will.

On proceedings to probate a will in which certain issues were directed to be tried in the Surrogate's Court before a jury, it was error for the court to refuse to submit to the jury the question whether the will was executed in compliance with section 21 of the Decedent Estate Law and to hold as a matter of law that the will had been properly executed, where the evidence introduced as to the execution of the will was conflicting and raised a clear question of fact.

The fact that the codicil, which was properly executed, referred to, the will and that the will was annexed thereto did not make the defectively executed will a part of the codicil or authorize its probate.

KRUSE, P. J., dissents, with memorandum.

APPEAL by the contestants, Julia Lawler Lambe and others, from a decree of the Surrogate's Court of the county of Onondaga, entered in the office of said surrogate on the 26th day of November, 1919, admitting to probate the alleged last will and testament of Edward Lawler, deceased, and the codicil thereto, after a trial before a jury, and also from an order entered in said surrogate's office on the 29th day of

November, 1919, denying contestants' motion to set aside the verdict and for a new trial made upon the minutes.

John T. Delaney [*John P. Hennessey* of counsel], for the appellant *Julia Lawler Lambe*.

Tracy, Chapman & Tracy, for the appellants *Daniel Lawler* and *Patrick Lawler*.

Joseph B. Murphy [*Edward W. Cregg* of counsel], for the respondent.

HUBBS, J.:

The contestants filed objections to the probate of the alleged last will and testament of *Edward Lawler*, deceased, also to the codicil thereto, and demanded a jury trial. An order was made directing that the issues raised by the objections filed be tried in the Surrogate's Court before a jury.

One of the objections filed by the contestants to the probate of said alleged last will and testament was the objection that it was not subscribed, published and attested as required by the statutes of the State. Section 21 of the Decedent Estate Law requires that every last will and testament shall be subscribed by the testator at the end, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses, and that at such time he shall declare the instrument so subscribed to be his last will and testament. The section also provides that there shall be at least two attesting witnesses and that each shall sign his name as a witness at the end of the will at the request of the testator.

One of the two attesting witnesses to the will in question died before the trial. The other was called by the proponent as a witness upon the trial and testified that *Edward Lawler*, deceased, was not present and did not sign said alleged will in the presence of the witnesses, and did not declare and publish it in the presence of the witnesses. The evidence of the witness was positive. He testified that *Mr. Lawler* was not in the room when he signed the paper as a witness; that he did not see him sign his name; that he did not know *Mr. Lawler's* signature; that he had never seen the signature at the end of the will before, and that *Mr. Lawler* did not sign

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the alleged will in his presence and in the presence of Mr. Rice, whose name appears as the other witness and who was dead. The witness testified that the only paper he saw was one sheet upon which was the attestation clause.

Other evidence was offered which tended to establish that the will was executed in accordance with the provisions of the statute, and that question was fairly one for the jury. The learned surrogate, however, held, as a matter of law, that the will had been properly executed with all the formalities required by the statute, and refused to submit that question to the jury. Counsel for the contestants duly objected and excepted to the court's ruling. The conflicting evidence upon the question of the execution of the alleged will raised a clear question of fact which should have been determined by the jury and not by the court as a question of law. (*McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 68; *Hagan v. Sone*, 174 id. 317.)

It is urged by the respondent that the decree should be sustained even though such ruling was erroneous, for the reason, as stated in respondent's brief, that "a duly executed codicil will take up and vivify a defectively executed will."

The codicil in question was dated and executed over six months after the will. It is not questioned but what it was executed with all the formalities required by statute, and it is contended that the proof of the due execution of the codicil authorized the admission to probate of both the will and the codicil. There are expressions in cases which sustain such contention, but, in view of the clear and unequivocal position of the Court of Appeals, it does not seem necessary or advisable to discuss those cases in detail.

In the case of *Booth v. Baptist Church* (126 N. Y. 215) Judge FINCH, writing for the unanimous court, said: "It is unquestionably the law of this State that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument." The principle was reaffirmed in *Matter of Fowles* (222 N. Y. 222, 232). (See, also, *Cook v. White*, 43 App. Div. 388; affd., 167 N. Y. 588; *Matter of Andrews*, 43 App. Div. 394; affd., 162 N. Y. 1.) In so far as the respondent's position on this question is concerned, the question stands as though the

alleged will had been attested by only one witness, and the respondent is in the position of contending that a properly executed codicil which refers to a will attested by only one witness constitutes a republication of such will and, by reference, incorporates such defectively executed will into the validly executed codicil, and entitles both to probate. That was the situation in *Matter of Emmons* (110 App. Div. 701) where it was held that an invalid will was not given validity by a subsequent codicil referring thereto, although the codicil was properly executed.

A will which was properly executed but has been rendered inoperative by law, or a will executed while the testator was of unsound mind or under restraint, may be revived and validated by the execution of a codicil. So a validly executed will which has been revoked by a subsequently executed will may be revived and republished by the execution of a codicil referring to such will. (*Brown v. Clark*, 77 N. Y. 369; *Cook v. White*, *supra*; *Matter of Campbell*, 170 N. Y. 84.) It will be noted, however, that in each of those cases the will was a valid will when executed and that its validity had been lost or suspended, and all that the codicil did was to revive and give life and vitality to the will which was executed in accordance with the terms of the statute. A codicil can give validity to a will only where the will was executed in accordance with the provisions of the statute and has, for some reason, become inoperative. The will in question did not fall within such class, and the due execution of the codicil did not entitle the will to probate.

It is suggested that the will in question became in fact a part of the codicil because it was physically attached to it when it was executed, and that when the codicil was executed, published and witnessed, the will was again executed, published and witnessed, and that the will and the codicil together constituted a new will, duly signed and witnessed at the end, as required by the statute. The trouble with that suggestion is that there is no evidence in the record to sustain it. Assuming that a testator could use an old will, in making a new one, by attaching to the back of the old will a new codicil, signing at the end of the codicil, and acknowledging the papers attached together to be his last will, that was not done

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in this case. The evidence is clear that the only paper declared in this case, and the only paper intended to be executed and witnessed was the codicil, and the fact that the will to which the codicil referred was physically present was a mere incident. It was not referred to in any way and the testator and the witnesses did not understand that an attempt was being made to execute a new will consisting of the codicil and the old will to which it referred. The attestation clause to the codicil recites, in the usual form, that the testator subscribed his name to the instrument and declared the same to be a codicil to his last will. Under the facts in this case the will referred to in the codicil cannot be treated with the codicil as a new will. The decree should be reversed and a new trial ordered, with costs to the appellants to abide the event.

All concur, except KRUSE, P. J., who dissents in a memorandum.

KRUSE, P. J. (dissenting):

I agree that if it was necessary to prove the original execution of the will it was error to hold as a matter of law that the evidence conclusively established such execution. But according to the testimony of Mr. Cowie, which is undisputed, he read the codicil to the testator, then gave the codicil and the original will to the stenographer and told her to fasten them together, which she did; thereupon the testator signed his name to the codicil and declared the codicil to be his last will and testament. The codicil in terms expressly reaffirms and ratifies all of the provisions of the original will save as modified by the codicil, and the original will so attached to the codicil precedes it. Thus, physically, the original will and the codicil became one document and was subscribed by the testator at the end. I think this establishes the execution of the will and codicil as the will of the testator, without proving the original execution of the will as a separate instrument.

I, therefore, vote to affirm.

Decree reversed and new trial granted, with costs to appellants to abide event.

In the Matter of the Probate of the Last Will and Testament of JOHN GRATTON, Late of the City of Plattsburgh, Clinton County, New York, Deceased.

DELIA GRATTON and Others, Appellants; MARY AYOTTE and JOSEPHINE LAMONDE, Respondents.

Third Department, January 5, 1921.

Wills — probate — when testimony of proponents contradicting evidence in behalf of contestants not incompetent under section 829 of Code of Civil Procedure — purpose of said section.

Where in an action for the probate of a will, an attorney who acted as counsel in a separation action between the testator and a woman with whom he had lived after his first wife had deserted him, testified in behalf of the contestants that at a meeting with reference to said action several years before the execution of the will at which others were present one or the other of the testator's daughters, beneficiaries under his will, made a request that her father make a will in behalf of herself and the other daughter, and that the father refused to make such a will at that time, and such evidence was offered for the purpose of showing a disinclination on the part of the father to make a will in behalf of said daughters and to show an importuning on their part, testimony by one of the daughters that neither she nor her sister made such a request, was not incompetent under section 829 of the Code of Civil Procedure.

The purpose of said section is to protect the estate in the hands of the executors or administrators; it prevents persons interested in the event of an action or special proceeding upon the merits from testifying to conversations with the deceased, but it has no application to the present situation.

APPEAL by the contestants, Delia Gratton and others, from an order of the Supreme Court, made at the Clinton Trial Term and entered in the office of the clerk of the county of Clinton on the 9th day of June, 1919, denying contestants' motion to set aside the verdict of a jury, and also from a decree of the Surrogate's Court of the county of Clinton, entered in said surrogate's office on the 3d day of July, 1919, admitting the will of John Gratton, deceased, to probate.

Arthur S. Hogue and John H. Booth, for the appellants.

C. J. Vert, for the respondents.

WOODWARD, J.:

Although this case has been argued with great elaboration, there is, upon the merits, very little to be said against the verdict of the jury and the resulting decree. There is no substantial evidence tending to establish undue influence, as that term is understood in the law; little, if any, evidence of incompetency on the part of the testator, and no substantial controversy as to the due execution of the instrument propounded as the last will and testament of John Gratton. The contestants have had all the advantages growing out of a jury trial; no error is pointed out in the charge of the court which merits consideration, and, unless the testimony of one of the parties was subject to the limitations provided by section 829 of the Code of Civil Procedure, the order and decree should be affirmed.

John Gratton, on the 6th day of May, 1918, made and executed in due form of law his last will and testament. He died on the first day of June following, and soon thereafter this will was offered for probate. A citation returnable on the 15th day of July, 1918, was regularly issued, and upon that day objections to the probate of the will were filed. On the nineteenth day of August the surrogate of Clinton county made an order transferring the trial to the Supreme Court, directing that six specific questions of fact be tried and passed upon by the jury. The case came on for trial on the 17th day of December, 1918, resulting in answers to each of the questions propounded in favor of the validity of the will. Thereupon the surrogate decreed that the will be admitted to probate; and the contestants appeal from the order denying a motion to set aside the verdict, and from the decree admitting the will to probate.

John Gratton appears to have been married early in life. His wife, after bearing him four children, deserted him and went west, taking her only son, and an unborn daughter, with her. Two daughters were left to the care of John Gratton, who subsequently went through the form of marrying a woman known as Virginia, with whom he lived for many years, though it was known to both parties to this alleged marriage that the first wife was living and undivorced.

The will now before the court provided for giving to his wife \$200 annually, and "all the rest and residue of my property I give and bequeath to my beloved daughters Mary Ayotte and Josephine LaMonde, share and share alike." These are the daughters of the first wife who were left behind, and they are likewise made the executrices of the will. It will be observed that this will is not upon its face an unreasonable or unnatural disposition of the property of this testator under the facts as stated, and where a jury has answered all the questions adversely to the contestants it is not the province of this court to be astute to discover a method of defeating the lawful purposes of a testator, though we might not approve his marital conduct.

Virginia had brought two several actions for separation from the testator, one in 1906 and another in 1914. The first action was settled on a consideration satisfactory to the parties and they resided together for several years afterward. The second action was tried, resulting in a judgment against the contentions of Virginia. Upon the trial of the issues submitted by the surrogate, and which are here under review, much testimony was adduced as to the family affairs, and in the course of the investigation John H. Booth, who acted as counsel in the litigation between John Gratton and Virginia, was called upon to testify as to a meeting which occurred in the office of Judge Healey back in 1914, at which Judge Healey, Mrs. Ayotte, Mrs. LaMonde, John Gratton and the witness were present. This witness testified that at this meeting one or the other of the daughters who are the beneficiaries under this will made a request that her father make a will in behalf of herself and the other daughter, and that the father refused to make such a will at that time. This was apparently offered for the purpose of showing a disinclination on the part of the father to make a will in behalf of the present beneficiaries, and to show an importuning on their part. But the surrounding circumstances indicate that this could have but very remote connection with the making of the present will in 1918. They were present in consultation over the then pending litigation between the father and Virginia. The question under consideration was the first wife and the possibility of her making trouble in the event of the father's

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dying, and the suggestion of the will grew out of this conference. It was in nowise a secret or privileged communication; it was made in the presence of counsel representing adverse parties and of a third person, besides the two daughters. After this witness had testified to this alleged request and refusal, Josephine LaMonde, one of the daughters involved, was called to the stand and after testifying to her relationship and her presence at the conference she was asked: "I call your attention particularly to the statement [of Mr. Booth] that you or your sister Mary Ayotte asked your father at that time that he make his will and leave you girls the property. Will you state whether you made any such request in substance or did your sister Mary Ayotte in your presence?"

This was objected to as incompetent under section 829 of the Code. The court overruled the objection, with an exception to the contestants, but added: "I do not allow it as a personal transaction between the testator and the witness. It is received only for its effect upon the testimony of Judge Booth." The witness answered: "I never asked my father," and on motion of contestants' counsel this answer was struck out.

The question was asked again in a slightly different form, the same objection and ruling were made, and the witness answered that she did not, and that she did not hear her sister make such a request.

Upon cross-examination this witness admitted that some such talk might have been had at this conference, so that the denial amounted simply to her declaration that neither she nor her sister asked her father at this semi-public conference to make a will in their behalf, though admitting that some such talk was had at the time by some one, and from other things appearing in the case it would seem that Mr. Booth was the one to suggest such action. It all related to a conference back in 1914; it was limited by the court to contradiction of testimony offered and received in behalf of the contestants, and it is difficult to understand how the testimony, assuming it to have been entirely incompetent, could have had any appreciable bearing upon the issues involved in the probate of this will.

But the purpose of section 829 of the Code of Civil Pro-

cedure is not to nullify the provisions of section 828 that "a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding." This is the rule, and section 829 is a modification; it is a case where it is "otherwise specially prescribed in this title," and we are not to extend its language beyond its strict letter. It is only upon the trial of an action "or the hearing upon the merits of a special proceeding" that "a party or person interested in the event" is not to "be examined as a witness in his own behalf" against "the executor, administrator or survivor of a deceased person * * * concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where * * * the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication." Here Mr. Booth had testified that either one or both of the daughters had "said in substance that the father ought to will the property to them, and asked him to do it. He said he would not do it." This is not technically the testimony of the deceased person in evidence; it is the testimony of Mr. Booth as to what the deceased person said; it purports to give both sides of a conversation which occurred in the presence of several persons, and the contestants having had the benefit of the alleged conversation it would be a very remarkable condition of the law if the person who was alleged to have had that conversation could not dispute the testimony of the living witness who gave it. The purpose of section 829 of the Code of Civil Procedure is to protect the estate in the hands of the executors or administrators; it prevents persons interested in the event of an action or a special proceeding upon the merits from testifying to conversations with the deceased, but it has no place in the situation here presented. Mrs. Ayotte and Mrs. LaMonde were nominated in the will as executrices, but they had no standing as such officials until the will was probated and letters issued. They were not before the court in this proceeding as executors; they were there as proponents of the last will and testament of their father. Their testimony could not have been "against the executor, administrator or survivor of a deceased person;"

they were not testifying against the executors, but against the contestants. If the contestants succeeded there would be no will; there would be no executors; they were not testifying to impose a burden upon the estate, but in support of the will made by their father, and at the particular time complained of they were merely contradicting the testimony of Mr. Booth, and we think the latter is not protected by anything in section 829 of the Code of Civil Procedure.

The order and decree should be affirmed.

All concur, JOHN M. KELLOGG, P. J., in result upon the ground that the alleged error in the admission of evidence was harmless and could not affect the result.

Order and decree affirmed, with costs.

C. F. BOOTH COMPANY, Respondent, v. ADAMS EXPRESS COMPANY, Appellant.

Third Department, January 5, 1921.

Appeal — when Appellate Division will not review facts.

The fact that upon the argument of an appeal it was conceded that findings had not been served, and that the exceptions might be filed at that time and treated as duly filed, did not perfect the record so as to permit of a review of the facts, there being no certificate of the court either that the record contained the necessary papers required by section 1853 of the Code of Civil Procedure or all of the evidence necessary to the determination of the questions presented, nor any order of the court directing the filing of the printed case as required by said section.

Where there is no certificate of the court that the case contains all of the evidence necessary to the determination of the question presented on appeal, the Appellate Division is bound to presume that sufficient evidence was offered on behalf of the plaintiff to warrant the decision and it will not review the facts.

APPEAL by the defendant, Adams Express Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Chenango on the 11th day of November, 1919, upon the decision of the court rendered after a trial at the Chenango Trial and Special Term, a jury having been waived.

Nelson P. Bonney, for the appellant.

Edward H. O'Connor [*H. C. Stratton* of counsel], for the respondent.

WOODWARD, J.:

The complaint sets forth a cause of action for negligence on the part of the defendant in the performance of its obligations as a common carrier in the transportation of certain merchandise, consisting of massage cream, in that such merchandise was permitted to freeze while in the custody of the defendant, thus destroying its commercial value. The case was tried before the court, without a jury, resulting in a judgment in favor of the plaintiff for the full amount of the claim. The defendant appeals from the judgment, and urges that the goods for which the plaintiff seeks to recover were not the property of the plaintiff, but belonged to the various consignees; that plaintiff has no property rights in the goods and cannot recover.

The difficulty with the appellant's case is that the court has found, as a matter of fact, that "at the time of the commencement of this action the title to the goods was in the plaintiff," it appearing that they had been rejected by the customers, such rejection being accepted by the plaintiff, and as a conclusion of law that the plaintiff was the proper party to bring the action; and the record does not permit us to go into the inquiry suggested. Upon the argument of this case it was conceded that the findings had not been served and that the exceptions might be filed at that time and treated as duly filed; but this did not perfect the record to permit of a review of the facts, for there is no certificate of the court, either that the record contains the necessary papers required by section 1353 of the Code of Civil Procedure, or all of the evidence necessary to the determination of the questions presented, nor is there any order of the court directing the filing of the printed case, as required by section 1353 of the Code of Civil Procedure. The case here presented is in identically the same condition as was the record in *Gregory v. Clark* (53 App. Div. 74, 75) and is very similar to that in the case of *Miller v. Farmers & Merchants' State Bank* (85 App. Div. 175, 178), and the judgment should be affirmed for the reasons therein

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suggested. Where there is no certificate of the court that the case contains all of the evidence necessary to the determination of the question presented on appeal this court is bound to presume that sufficient evidence was offered on behalf of the plaintiff to warrant the decision, and it will not review the facts. (*Mackintosh v. Kimball*, 101 App. Div. 494, 498; *Meislahn v. Irving National Bank*, 62 id. 231, 234; *Kissam v. Kissam*, 21 id. 142, 145; *Uhlefeldt v. City of Mount Vernon*, 76 id. 349, 351; *Young v. Barker-Ransom*, 139 id. 194, 195, and authorities there cited.)

The judgment appealed from should be affirmed.

Judgment unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of ELIZABETH SKEELS, Respondent, for Compensation under the Workmen's Compensation Law, on Behalf of Herself and Infant Children for the Death of Her Husband, MYRON J. SKEELS, v. PAUL SMITH'S HOTEL COMPANY, Employer, Appellant, Impleaded with STATE INSURANCE FUND, Insurance Carrier, Defendant.

Third Department, January 5, 1921.

Workmen's Compensation Law — evidence insufficient to establish contract of employment.

In a proceeding before the State Industrial Commission for the death of claimant's husband who was killed while at work in cutting timber, *held*, on all the evidence, that he was not an employee of the alleged employer, a corporation, at the time of his death.

The jurisdictional fact of a contract of employment must be established by due process of law; by evidence which would be required to establish any other contractual relation. A mere scintilla of evidence is not sufficient.

APPEAL by the defendant, Paul Smith's Hotel Company, from an award of the State Industrial Commission, entered in the office of said Commission on the 17th day of October, 1919.

Francis Barry Cantwell, for the appellant.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

Myron J. Skeels met his death while at work in cutting timber for wood pulp upon premises owned by the Paul Smith's Hotel Company, in the town of Brighton, Franklin county, on the 14th day of November, 1918, and the question necessary to the disposition of this appeal is whether he was an employee of that corporation at the time of his death.

On the 20th day of November, 1918, the claimant wrote a letter to the State Industrial Commission in which she says: "Enclosed find notice of death of my husband who was killed working in the lumber woods for Paul Amell." On the twenty-ninth day of November of the same year the claimant verified her formal claim, in which she stated that she made claim for compensation for "the death of Myron J. Skeels, who died on the 14th day of November, 1918, in the employ of Paul Amell, of Lake Clear, N. Y." On the thirtieth day of November of the same year the claimant again wrote the State Industrial Commission saying that "my husband was cutting wood by the cord as all the men are for Mr. Amell, and did not have a contract to cut any amount, and he worked for Mr. Amell by the day at different times. Mr. Amell is getting the wood out for Paul Smith's Hotel Co.," etc. On the fourth of December following Mr. Amell, writing to the State Industrial Commission in reference to this claim, says: "I did not have a written contract with Skeels, but had a verbal contract at a certain price per cord and his partners William Buckley and William Ryan have since Skeels' death continued work by the cord," and the letter closes with a declaration that "I was in no sense his employer, as he was an independent contractor." On the twenty-eighth of December of the same year the Paul Smith's Hotel Company wrote the State Industrial Commission saying that "Paul Amell is a pulpwood contractor, that has a verbal contract with this company to deliver pulpwood loaded on the cars at a certain price per cord, so that he is not on our payroll. * * * Amell has no authority to hire help for

this company and Skeels had no authority to hire help for Amell." A letter from Amell on the 9th day of January, 1919, continues his denial of responsibility. Buckley and Ryan make a joint affidavit to the effect that Skeels was engaged with them in a joint undertaking to cut pulpwood by the cord for Paul Amell at the Paul Smith tract, but make no suggestion that the Paul Smith's Hotel Company had any connection with the matter. Alexander Liberty in an affidavit sets forth that he was a bookkeeper for Paul Amell, and that the decedent, Skeels, with Buckley and Ryan, was engaged in cutting this pulpwood by the cord for Amell, and Paul Amell makes an affidavit to the same effect on the 13th day of January, 1919, and on the same day Paul Smith, Jr., makes an affidavit in corroboration of those previously mentioned. Subsequently Paul Smith (whether junior does not appear) appeared before one of the deputy commissioners and testified to a like state of facts. At this same hearing the claimant was examined by the deputy commissioner, and in answer to leading questions said she did not know anything about the contractual relations between her husband and Paul Smith, or between her husband and Paul Amell; that she only knew that he worked at Mr. Smith's and Paul Amell was over him; that she always thought her husband worked for Paul Smith, and that she always considered that he "was one of his employees;" that she always thought his wages came from Paul Smith.

Here we find the first subtle suggestion of Smith's relation to the death of Skeels. It is to be noted, however, that it makes no mention of the Paul Smith's Hotel Company, which is a domestic corporation having a legal entity entirely distinct and apart from the individuals who compose it, and the record shows two Paul Smiths, one designated as "Paul Smith, Jr.," and the other merely as Paul Smith, and it must be obvious that the record up to this time does not disclose any contractual relations whatever between the Paul Smith's Hotel Company and the decedent, and without such a relationship there is no foundation for the operation of the Workmen's Compensation Law. (Workmen's Compensation Law, § 2, clause 1, as amd. by Laws of 1917, chap. 705; Id. § 3, subds. 3, 4, 5, 6, 7, as amd. by Laws of 1917, chap. 705; Id. § 10; *Palmer v. Van Santwoord*, 153 N. Y. 612, 614; *People ex rel. Gilmour v. Hyde*, 89 id. 11, 17.)

There can be no employer or employee or employment, as used in the Workmen's Compensation Law, without an act of hiring (*People ex rel. Gilmour v. Hyde, supra*), for these words have a distinct and well-defined meaning in the jurisprudence of the State, and must be deemed to have the same meaning when used in the statutes. (*Perkins v. Smith*, 116 N. Y. 441.) In *Kackel v. Serviss* (180 App. Div. 54), followed in *Tsangournos v. Smith* (183 id. 751), this court held that the jurisdictional fact of a contract of employment must be established by due process of law; by evidence which would be required to establish any other contractual relation, and that in the absence of such evidence no foundation was laid for the operation of the Workmen's Compensation Law. The determination of the State Industrial Commission that Paul Smith's Hotel Company should pay the award, without evidence to support it, is not due process of law. The action of the Commission in making such a ruling, where there is no evidence of the existence of a contract of hiring, is an attempted exercise of an arbitrary power, not reaching the character of legislation. It is mere confiscation, and it is fundamental that every inhabitant of this State is entitled to retain his property until it has been judicially determined that some one else has a better right to it. Where the claim is that confiscation of property will result from the action of a commission in fixing rates, or otherwise, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both the law and facts" (*Ohio Valley Water Co. v. Ben Avon Borough*, 40 Sup. Ct. Repr. 527, 528, and authorities there cited), and unless we find in this record some evidence of a probative character that the decedent was an employee of the Paul Smith's Hotel Company the award cannot stand. Our attention is not called to any such evidence. The learned Attorney-General, in his brief, tells us that "the connection of the Paul Smith Hotel Company with the job was by the fact that it had a superintendent by the name of Owens who went around the woods to see that the wood was cut and cleaned up properly, and also to measure the wood so that money could be advanced upon it and to see that they cut in the proper locality and what trees to cut. This man was called the superintendent in the woods.

Mr. Amell says that he was there to measure the wood and give instructions what to do and how to do the work. Mr. Amell was himself a poor man, not able to pay any award, and in view of the fact that his principal, Paul Smith, advised him not to take out any insurance we think that the defendant should be held to pay the award."

No evidence is produced that Paul Smith was the principal of Mr. Amell; the uncontradicted testimony is that Mr. Amell had a verbal contract for cutting the pulpwood timber on the hotel property tract at a given price per cord, and that Owens was the man who had charge of measuring the wood as it was cut, and of seeing to it generally that Amell performed the conditions of the contract. There is not a particle of evidence that Owens had any control over Skeels, or that Amell had any control over the manner in which Skeels performed his work, except to confine him to a particular piece of land. Skeels was, by all the evidence, engaged in a joint enterprise with two other men in the cutting of pulpwood under a subcontract with Amell, and the fact that he entered into an agreement which did not entitle him to compensation from Amell, or that Amell was too poor to pay compensation, does not warrant holding the Paul Smith's Hotel Company for the amount of this award. The only foundation on which an award can lawfully be made against the Paul Smith's Hotel Company is evidence that Skeels was an employee of that corporation, and there is no evidence of this. The testimony of the claimant that she always supposed her husband worked for Mr. Smith clearly does not reach the dignity of a scintilla of evidence that the Paul Smith's Hotel Company employed the decedent, and a mere scintilla of evidence is not sufficient upon a jurisdictional question, such as is here involved. (*Matter of Case*, 214 N. Y. 199, 203, and authorities there cited.) The Legislature itself could not determine that a man was an employee, for the purpose of taking property from the alleged employer, where no such relation in fact existed—certainly not after the accident had occurred. "The true interpretation of these constitutional phrases is," say the court in *Wynehamer v. People* (13 N. Y. 378, 393), dealing with "law of the land" and "due process of law," "that where rights are acquired by the citizen under the existing law, there is no power in any branch

of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him — not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals of the State. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it cannot be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence." The right to contract; the right to determine whether one shall be an employer or an employee, is an essential element of that liberty guaranteed by our constitutional system, and there is no power in the Legislature to determine, or to authorize any tribunal to determine, that that relation exists where the parties themselves have not expressly or impliedly consented to occupy that relationship. In the case here under consideration no notice was given to the Paul Smith's Hotel Company that it was to be charged with the payment of an award; no one made any such claim against it. The fact that Paul Smith appeared as a witness does not give the court or tribunal jurisdiction of the Paul Smith's Hotel Company, and the rule is well settled that "no judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." (*Scott v. McNeal*, 154 U. S. 34, 46.) There was no jurisdiction in the Workmen's Compensation Law except of accidents to employees, and while the State Industrial Commission probably has power to determine the question of employment primarily it cannot be permitted to charge an individual or corporation with an award where the undisputed evidence shows that there was no contract of employment.

The award appealed from should be reversed and the claim dismissed.

All concur.

Award appealed from reversed and claim dismissed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of ADAM C. KELLER, Respondent,
for Compensation under the Workmen's Compensation
Law, v. REIS & DONOVAN, INC., Employer and THE
TRAVELERS INSURANCE COMPANY, Insurance Carrier,
Appellants.

Third Department, January 5, 1921.

**Workmen's Compensation Law — injury on public highway in city
in adjoining State while proceeding to place of work — injury
not arising out of and in course of employment.**

A workman who slipped upon a curb in one of the public highways in a city in an adjoining State, at about twenty minutes past eight o'clock while proceeding to his place of work, and was injured, did not sustain an accidental personal injury arising out of and in the course of his employment within the meaning of the Workmen's Compensation Law, although there was an agreement between a labor organization and employers providing that a workman employed outside the city district who does not live near his work must be at the limit of the city district nearest to the place of work as near eight o'clock as is possible, and shall proceed to the place by the shortest route.

KILEY, J., and JOHN M. KELLOGG, P. J., dissent, with memorandum.

APPEAL by the defendants, Reis & Donovan, Inc., and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 21st day of November, 1919, and also from an award of said Commission entered in the office thereof on the 10th day of May, 1920.

Benjamin C. Loder [*E. C. Sherwood* and *William B. Davis* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel; *Bernard L. Shientag*, counsel to the State Industrial Commission, and *Peter M. Daly* of counsel], for the respondents.

WOODWARD, J.:

The claimant, on the 12th day of September, 1919, slipped upon a curb in one of the public highways in Newark, N. J., and sustained a fracture of the lower extremity of the shaft of

the fibula of the left leg, for which the State Industrial Commission has made an award covering the period from the time of the accident to the 10th of November, 1919, on which date the disability terminated. Ordinarily, of course, an employee is not entitled to compensation for injuries occurring upon the public highways, to which we are all exposed in common, but the claimant lived in the borough of The Bronx in the city of New York; his employer, engaged as a general electrical contractor, had offices at 8 West Fortieth street, New York, and at the time had a contract for the doing of some work in a building situated in Newark, N. J., and the accident occurred at about twenty minutes past eight o'clock in the morning, after the beginning of work hours, under the provisions of an agreement between a labor organization and employers, among them the defendant here. The important question is, of course, whether there was "an accidental personal injury sustained by the employee arising out of and in the course of his employment" (Workmen's Compensation Law, § 10), and this involves the question whether an agreement regulating hours and conditions of labor entered into between a labor organization and employers can operate to give a compensable case where none would exist without it.

The agreement here under consideration provided that "the hours of labor shall be eight hours per day, to be performed within the hours of 8 A. M. and 5 P. M.," and that "all workmen shall be paid for the time they are actually at work in the Borough of Manhattan, Borough of The Bronx, and at all other points within a radius of ten (10) miles from City Hall." It was then provided that "a workman employed outside the city district," as above defined, "who does not reside near his place of work, must be at the limit of the city district nearest to the place of work as near to 8 A. M. as is possible, and shall proceed to the place by the shortest route," and while there is no specific provision for paying for the time thus lost to the employer, it is a fair inference that this was the purpose of the agreement; that it was intended that an eight-hour day should prevail for all workmen within the scope of the agreement, those going outside to be paid for the time lost in traveling beyond the city territory. But this agreement did not attempt to provide that the employer should become an insurer of the workman

against the risks incident to travel upon the public highways. It did not undertake to give to employees outside of the city district a greater degree of protection than those who worked within the district; it merely fixed an eight-hour day and provided that those within a certain district must perform eight hours of labor, while those without such district, and subject to the agreement, must be at the district line at the hour fixed for service and must proceed by the nearest route to the place of employment. In other words, the eight-hour day of labor was not required of those who went outside the city district; they satisfied the terms of the agreement if they were at the boundary line nearest to the place of employment and proceeded by the most direct route to the place of employment, and the spirit of the agreement is manifest in the further provision that "where a workman is employed outside the city district, and resides near such work, he shall report and quit at the regular time, and shall not be entitled to any car fare." The whole purpose of the agreement was to equalize conditions of labor; to provide that the man going outside of the city district, with the exception above noted, should not be obliged to give more time to the employment than those within the district. The eight-hour day standard was to be subject to such a reduction of the time at labor as was necessary to reach the place beyond the nearest line of the city district. It was not an agreement that the employment should begin at eight o'clock outside of the city, subjecting the employer to the burden of risks in no wise connected with his particular enterprise, but a concession from the eight hours prescribed for those within the city district. He was to get as near to the place of employment within the city district as possible at eight o'clock in the morning, and he was not to be penalized for the time that it took him to go from that point to his place of labor; his wages were to be those provided for the eight-hour day, and while "all workmen shall be paid for the time they are actually at work" in the city district, outside they were to be paid for the eight hours, regardless of the time actually worked, provided they complied with the conditions named. If the employer did not like to lose this time it was provided that he might direct the employee to board at the place where the work is located, but in that event the

employer was to pay the board bill, when, of course, he would be entitled to the full eight hours' work.

From this analysis it is evident that the contracting parties did not contemplate increasing the liabilities of the employer by commencing the employment before the claimant had reached the place of labor. There was no intention of making better conditions for those who went outside the city district than those who worked within the district; it merely protected the man going outside from the hardship of getting up early enough in the morning to reach his employment by eight o'clock. He was doing what his fellow-laborers did in substance when he reached the city district boundary at the time they were called upon to go to work within that district, and beyond that he was allowed from his labor sufficient time to reach the place of employment without a sacrifice of any part of his day's wages. The agreement obviously sought an equalizing of the conditions of labor for the members of its union, with no purpose to change the provisions of the Workmen's Compensation Law in its relation to such members, and clearly no employer, acting freely, would enter into an agreement to become the insurer of his employees upon their way to work, for the very spirit of the statute is that it is to compensate for the accidents growing out of the employment, and which are properly chargeable against the industry as a part of the cost of production. The claimant may, for aught that we know, have a cause of action against the city of Newark for negligence in the care of its highways, but we are fully persuaded he has no claim against the enterprise conducted by his employer because of an accident happening to him upon the public highways of Newark, while he was doing no service for the employer.

The provision of the statute is that "compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments" (Workmen's Compensation Law, § 2, as amd. by Laws of 1917, chap. 705), and clearly the claimant was not "engaged" in a "hazardous employment" when he was walking along one of the highways of Newark, in the State of New Jersey, and doing nothing to advance the interests of his employer; that is not one of "the fol-

lowing hazardous employments" mentioned in the statute. The act, to quote from a Massachusetts case, cited in *Matter of Alpert v. Powers* (223 N. Y. 97, 101), "does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. * * * The personal injury must be the result of the employment and flow from it as the inducing proximate cause. * * * The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being." Nothing that the claimant was doing had any relation whatever to the employment; he was doing nothing for the employer. He was serving his own purpose of getting to the place of employment, under an agreement which protected him against loss of time, but which in nowise advanced the well-being of the employer, and the employment to which he was proceeding could in no possible sense be said to be a proximate cause of the accident. "Employment," says subdivision 5 of section 3 of the statute (as amd. by Laws of 1917, chap. 705), "includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith," and "'employee' means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer." (§ 3, subd. 4, as amd. by Laws of 1917, chap. 705.) The accident must be "in the course of his employment," "only in a trade, business or occupation carried on by the employer;" and the facts in this case do not bring the claimant within these definitions prescribed by the statute. "When an employee is injured through some act of his own, not an incident to his employment, and not authorized or induced by his employer in connection with his employment, the injury does not arise out of and in the course of his employment within the meaning of subdivision 7, section 3 of the Workmen's Compensation Law" (*Matter of Gifford v. Patterson, Inc.*, 222 N. Y. 4, 8); and we are clear that the

State Industrial Commission is in error in making the award here under review.

The award should be reversed, and the claim dismissed.

All concur, except KILEY, J., dissenting with a memorandum, in which JOHN M. KELLOGG, P. J., concurs.

KILEY, J. (dissenting):

I am of the opinion that this award should be sustained. Subdivision 4 of section 3 of the Workmen's Compensation Law (as amd. by Laws of 1917, chap. 705) says: "'Employee' means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, *or in the course of his employment away from the plant of his employer*," etc. The employer was an electrical contractor and some of its work was electrical wiring. The claimant resided in the city of New York, and the principal place of business of his employer was also in New York city. On September 12, 1919, and previous thereto, the employer was doing a job of electrical wiring in Newark, N. J. The claimant had worked for this employer several years and was in his employ on the day aforesaid. It appears from the record that at the time of this accident an agreement was in existence and operative, entered into between the Electrical Contractors' Association and the inside electrical workers of Greater New York, to which the employer herein, and the claimant employee (he being an inside electrical worker), were parties. It provides as follows:

" 5. The hours of labor shall be eight hours per day, to be performed within the hours of 8 A. M. and 5 P. M. on every day, excepting Saturday, Sunday and on legal holidays. The hours on Saturdays shall be from 8 A. M. until 12 noon."

" 12. All workmen shall be paid for the time they are actually at work in the Borough of Manhattan, Borough of The Bronx, and at all other points within a radius of ten (10) miles from City Hall, which territory shall be known as the city district, and shall receive all necessary fare exceeding ten cents.

" 13. A workman employed outside the city district, who

does not reside near his place of work, must be at the limit of the city district nearest to the place of work as near to 8 A. M. as is possible, and shall proceed to the place by the shortest route. In returning he shall arrive at the aforesaid point as near to 5 P. M. as possible, but if directed by his employer to board at the place where the work is located, the necessary expenses for the board shall be paid by the employer.

" 14. Where a workman is employed outside the city district, and resides near such work, he shall report and quit at the regular time, and shall not be entitled to any car fare."

This is important only as showing the contract between claimant and his employer. It shows that his day and his pay commenced at eight o'clock A. M. and at the New York city line; from the city line to Newark, N. J., claimant was on the employer's time and transported to his work or to the station, within three or four blocks of his work, at his employer's expense. If the railroad or trolley station was at the works or place where claimant was performing service under his contract, then, under *Matter of Littler v. Fuller Co.* (223 N. Y. 369), there would not be any question as to his right to compensation. While the evidence does not show, outside of the rules above quoted, from these it is inferable that his employer was paying claimant's car fare as far as the road ran toward the place where he was to render service. We have this situation, the time of injury was eight-twenty A. M.; while he was on the employer's time and just after he left the conveyance on his way to the place of actual service he slipped and fell while he was completing a small fraction of his journey on foot, made necessary because the conveyance did not go quite to his destination. I think he was in the course of his employment under section 3, subdivision 4, of the Workmen's Compensation Law, and that the accident arose out of his employment. (See §§ 10, 3, subd. 7, as amd. by Laws of 1917, chap. 705.) It is too narrow a construction of the law to hold that this little hiatus of three or four blocks took the case out of the statute, where, by force of circumstances, he had to walk to his work.

I favor affirmance.

JOHN M. KELLOGG, P. J., concurs.

Award reversed and claim dismissed.

In the Matter of the Application of RALPH BALDUCCI, Landlord, Respondent, for the Removal from Certain Premises of HERMAN RAKOV, Tenant.

LENA RAKOV, Appellant.

Third Department, January 5, 1921.

Landlord and tenant — summary proceedings — lack of jurisdiction because proceedings are not authorized cannot be raised for first time on appeal — proceedings to dispossess tenant for non-payment of rent and failure to perform covenants of lease — notice to tenant — violations of lease before plaintiff acquired property — knowledge by plaintiff of violation — right of court to deny dispossession and fix compensation where violations not willful.

The objection that the court did not acquire jurisdiction of summary proceedings brought to recover the possession of real property for non-payment of rent and violations of the covenants of the lease, because the proceedings were not authorized under section 2231 of the Code of Civil Procedure, cannot be raised for the first time on appeal.

The proceedings having been brought to recover possession of real property and not to recover the rent, after default in the payment of rent and failure to perform the covenants of the lease, and after the service of the three days' notice, they were maintainable under section 2231 of the Code of Civil Procedure, and the fact that the landlord gave the tenant twenty-one days' notice should not vitiate the notice.

A landlord and tenant may agree as to what shall constitute a breach of the covenants of the lease, and a breach of the covenants is available to the landlord in summary proceedings instituted under said section.

The fact that some of the acts of commission and omission which constitute a breach of the lease were committed before the plaintiff acquired the property, and the further fact that the plaintiff knew of such changes in the electrical equipment of the building but did not know the effect thereof until notified by the board of fire underwriters, does not constitute a defense to the proceeding. Especially is this true since the tenant neglected and refused to comply with the request of the landlord to put the electrical equipment and other things affecting the fire risk in the condition they were before the changes were made.

The proceeding being one for the recovery of possession of real property the court does not have the power to refuse to grant a warrant of dispossession on the ground that the violations of the lease were not willful and that, therefore, compensatory damages only ought to be awarded.

APPEAL by Lena Rakov from an order of the County Court of the county of Madison, entered in the office of the clerk of said county on the 16th day of April, 1920, awarding posses-

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sion of certain premises in the village of Canastota, N. Y., to the respondent.

Nash, Britcher & Eckel [George B. Russell and John F. Nash of counsel], for the appellant.

Campbell & Woolsey [R. D. Woolsey of counsel], for the respondent.

KILEY, J.:

On the 19th day of September, 1914, William Sherwood and John Sherwood leased to Herman Rakov "The Theater, known as the Sherwood Theater, including the auditorium, stage, dressing rooms and passageway leading from the stage to the dressing rooms, located in the new Sherwood Block on the west side of Peterboro Street in the village of Canastota, New York, together with the use, in common with other tenants of the block, of the lobby leading from Peterboro Street to the auditorium; also the use, in common with other tenants of the block, of the stairway and hall leading from Peterboro Street to the box of said Theater on the second floor." The term under said lease was to commence and did commence September 21, 1914; it was for a period of five years, to end September 20, 1919. The rent reserved in the lease is \$100 a month for occupation and \$10 a month additional "from the time the fire is started in the heating plant in the fall of each year until it is allowed to go out in the spring of each year during the term of this lease." It was stipulated that at the commencement of the term "all electric fixtures and electric bulbs are in perfect condition." It is further provided in said lease: "And further agrees to save the parties of the first part free, clear and harmless from any and all damages, actions or causes of action that may result from any cause by reason of the conducting of the said theater during the term of this lease." Again, it is further provided as follows: "It is further understood and agreed, that should the party of the second part at any time fail, neglect or refuse to perform the covenants herein specified for him to perform, or either of them or fail to pay his rent or any part thereof, at the time it shall become due and payable, the parties of the first part at their option may immediately terminate this lease upon three days' notice and remove said party of the second

part and all persons in his employ from the said theater, together with all equipment or other property belonging to him." Added to the lease and executed by the parties to the lease, at the same time, is a separate agreement which provides that the lease may be renewed for an additional period of five years on the same terms and conditions, by giving the lessors notice of such intention six months before the termination of the lease. On the 19th day of September, 1914, by an instrument in writing, the lessors consented that said lease be assigned to Lena Rakov, reserving and not waiving any of their rights under said lease. On October 23, 1917, the respondent purchased of the Sherwoods the premises in question, including the theater, and succeeded to all of their rights under said lease. Herman Rakov or his wife, Lena Rakov, aforesaid, was in possession under the lease. On January 17, 1919, Herman Rakov served notice upon respondent of his intention to renew the lease for an additional period of five years under the terms and conditions of the then existing lease. On March 15, 1919, the appellant and Herman Rakov served a similar notice upon respondent. At the time Herman Rakov first entered into possession of the theater under his lease, the electrical wiring, equipment, operator's booth for moving pictures, their and its location and arrangements had been inspected by an electrical inspector for the Underwriters Association of the State of New York, and had been passed and found up to the standard, so that the usual premium rates prevailing in that community were applicable to this property. The evidence shows that previous to the 1st day of November, 1919, the fixtures and wiring had been changed by the tenant; that uninsulated flexible cords of varying lengths were put in and used; that precautions laid down by the Underwriters Association to prevent fire and the spreading thereof to other parts of the building were disregarded; that the top or roof of the operator's booth, in which the apparatus for projecting pictures upon the screen or canvas, made of and completely inclosed in asbestos, so that any fire originating therein is confined to the booth, had been removed (this after respondent had acquired the property); that no sand in pails or other receptacles was kept in the booth as required. Thirteen dollars rent due for maintaining fires, in accordance with said

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lease, during the fall of 1919 and before the 1st of November, 1919, was not paid and payment by the tenant was refused. Respondent did not know of these omissions and commissions, except the non-payment of rent, until he was notified that the rate on his insurance had been raised so that it was costing him ninety cents a hundred in advance over what it was before the above conditions were created or allowed to exist. As soon as respondent learned of them he asked the tenant to replace the electrical fixtures, wiring and apparatus in the same condition as they were before the changes were made. This the tenant neglected and refused to do, except in a few minor details. The condition of the booth which caused fifty cents a hundred dollars of the raise in premium on insurance was not corrected at the time of the trial. On the 1st day of November, 1919, the landlord, as petitioner, and respondent herein, served or caused to be served upon the tenant the following notice:

" Please take notice that whereas, you are occupying and operating the Theater or Moving Picture Show in the Sherwood block on the west side of Peterboro Street in the Village of Canastota, N. Y., in pursuance of the terms of the lease made and executed on the 19th day of September, 1914, between William Sherwood and John Sherwood and yourself, and

" WHEREAS, said lease contains a provision giving the owner thereof the right to terminate the lease in case you fail, neglect or refuse to perform the covenants contained in said contract, and

" WHEREAS, you have heretofore failed, neglected and refused and still fail to perform said covenants, the undersigned, in pursuance of the option given him according to the terms of said lease, hereby cancels and terminates the same and hereby gives you notice that you must remove from said premises on or before the 21st day of November, 1919.

[Signed] " RALPH BALDUCCI.

" Dated CANASTOTA, N. Y., *November 1st, 1919.*

" To HERMAN RAKOV."

There is no assignment in the record of this lease from Herman to Lena Rakov, but there is a stipulation that the

proceedings may be had and maintained the same as if she had been named instead of Herman Rakov. The tenant did not vacate the premises, and on November 22, 1919, the respondent made and filed his petition for the order of removal of the tenant under chapter 17, title 2, of the Code of Civil Procedure as authorized by section 2231 of that Code. The tenant filed and served an answer; upon the issue thereby raised a trial was had resulting in the order appealed from to this court. Appellant's first contention is that the court did not acquire jurisdiction because the proceedings were not authorized under section 2231 of the Code of Civil Procedure. Passing that for the moment, let us see if he is in position to raise the question on this appeal. The stipulation settling the case provides that in addition to the printed record there shall be furnished for the use of the court upon this appeal the affidavits and papers used by appellant upon his motion for a new trial, after decision, before the County Court; that has been done; nowhere in the record is this question raised. The trial proceeded upon the theory that the petition and answer made the issue and it was so tried; neither by answer nor motion before or during the trial, or at the close of the evidence, was the question raised, as to jurisdiction, which is urged here. When petitioner rested his case counsel for appellant made the following motion: "I move for a dismissal of this proceeding, upon the ground the plaintiff has failed to sustain the burden of proof upon him to show there is any violation of this lease, or any violation of landlord and tenant upon the statute." At the close of the evidence appellant's counsel said: "I renew my motion for a dismissal of the complaint." Both motions were denied. These were the only motions made where it can be claimed that the question was raised; it was not raised by these motions. On the motion for a new trial the affidavits admit that it was not raised; it is tried, in these affidavits, to have it appear that it was faintly or remotely, perhaps obscurely would be the better term, raised. Such was not the fact, so that we have the case tried on the theory that there was no such question to be raised, and that a decision upon the merits, as disclosed by the facts, was all that was sought. It is too late to raise the question now, even if it were of advantage to the appellant, which it is not,

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and is not tenable. Let us assume it was raised. The court found upon sufficient evidence that the thirteen dollars back rent was not paid. Subdivision 2 of section 2231 of the Code provides, speaking of the tenant: "Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made;" then follows the disjunctive "or" followed by the provision for a three days' notice. If the tenant were not in default after the demand made by the landlord, which was made and so found upon sufficient evidence by the court, and payment refused by the tenant, which was also found by the court upon sufficient evidence, then the notice hereinbefore set forth put him in default. The lease provides that for any default in performance, viz., the payment of rent when due or a failure to save the landlord from damage, he at his "option may immediately terminate this lease upon three days' notice." The giving of the notice terminated the lease; the three days is grace given the tenant to move. In this case the notice was twenty-one days and it is urged that the tenant was prejudiced because it was not made three days instead of twenty-one days. We fail to see where the notice served was disadvantageous to the tenant because he was given a longer time to move, viz., twenty-one days. This proceeding was not brought for the recovery of rent, but solely to recover possession of the premises described in the petition; and, after default in payment of rent and failure to perform the covenants of the lease, and after the service of the notice, was maintainable. (*People ex rel. Terwilliger v. Chamberlain*, 140 App. Div. 503.) It is urged that summary proceedings do not lie under section 2231 upon the further ground, presumably, because a failure to perform the covenants agreed to be performed by the tenant in this lease is not specified in that section. The answer to that argument is that the landlord and tenant can, and in this lease did, agree what should constitute a breach of the covenants. The cases hold that such breach is available to the landlord in summary proceedings. (*Miller v. Levi*, 44 N. Y. 489; *Matter of Szpakowski*, 166 App. Div. 578.) A well-considered opinion on the question involved here is reported in *Martin v. Crossley* (46 Misc. Rep.

254). The rule stated in 44 New York, 489 (*supra*) seems to have been followed and cited with approval quite generally. (*Schreiber v. Elkin*, 118 App. Div. 244; *Scheele v. Waldman*, 136 id. 679.) The tenant seems to assume that such acts of commission and omission as give rise to respondent's complaints occurred before he acquired the property, and that he took the property loaded with such defects, if they existed, and has no remedy in law by reason thereof. The evidence shows that the most serious breach of the contract occurred after respondent took title, viz., the removal of the top or roof of the asbestos booth; for that fifty cents a hundred was added to the premium rate he had to pay for his insurance. Some uninsulated flexible cords were introduced in the electrical system, the presence of sand in the booth was omitted, and the non-payment of the rent found due, were all after Balducci purchased the property. It is further urged that respondent knew of those changes and by not forbidding them he waived his right to complain. He may have seen some of those changes, but he did not know the effect. It appears that he is not possessed of the technical knowledge required to determine the menace of bare wires, uninsulated flexible cords, and open asbestos booths where electrical equipment is operated. He cannot be held to have consented to what he did not know. Even the Underwriters Association has to employ an electrical inspector to fix the hazard and apportion insurance rates accordingly. The landlord received his first notice when he was called upon to pay at the rate of \$180 extra insurance premium because of the violation; then he did act; he asked the tenant to put the system in the same condition in which it was before the changes were made. The neglect and refusal of the tenant to comply with such request were reasons (breach of contract) that justified this proceeding. The suggestion that the trial proceeded along lines similar to those followed in an ejectment action is not far afield; but who is responsible for the theory and method and subsequent course of the trial until a decision was reached? One will search this record in vain for a specific motion or objection where either the procedure or practice is assailed. By common consent the issues were joined and by common consent they were developed by evidence relevant to such issues; the decision

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of the court was urged by each in his favor, upon the evidence so produced, and a decision of the court was had before the theory, practice and procedure now urged were advanced. It is urged by appellant that if this court shall sustain the order granted against him, the evidence justifies a finding that the breach upon which the proceedings were based was not willful, and that some other compensation than dispossession should suffice and be satisfactory to the landlord. As before observed, this is not a proceeding for rent, nor for money damages; there is no basis upon which we can fix compensatory damage to the respondent and at the same time uphold appellant's right of occupation under the lease.

The order should be affirmed, with costs.

Order unanimously affirmed, with costs; H. T. KELLOGG, J., not sitting.

ADALINE ROCK, Appellant, v. LEVI ROCK and LENA ROCK,
Respondents.

Third Department, January 5, 1921.

Ejectment — proceedings based on deed alleged to have been executed by defendants to plaintiff's grantor — evidence required to overcome presumption of execution arising from certificate of acknowledgment — case properly submitted to jury.

In an action in ejectment based on a deed alleged to have been executed by defendants to the plaintiff's grantor which bore a proper certificate of acknowledgment of the execution of the deed by the defendants with their marks, the defense interposed was that the defendants never executed the deed in question.

Held, that the certificate of acknowledgment to a deed is *prima facie* proof only of its due and proper execution and as such takes the case to the jury.

On the evidence introduced the case was properly submitted to the jury and there was more than a bare preponderance of evidence, supported by uninterested witnesses, and it was for the jury to decide, having seen the parties and the witnesses and their manner of testifying, whether the proof as submitted was so clear and convincing as to amount to a moral certainty that the deed in question was not executed by the defendants.

APPEAL by the plaintiff, Adaline Rock, from a judgment of the Supreme Court in favor of the defendants, entered in the

office of the clerk of the county of Clinton on the 26th day of July, 1919, upon the verdict of a jury, and also from an order entered in said clerk's office on the 26th day of July, 1919, denying plaintiff's motion for a new trial made upon the minutes.

Allen & Allen [Seth S. Allen of counsel], for the appellant.

Victor F. Boire, for the respondents.

KILEY, J.:

This is an action in ejectment. The plaintiff is the mother of the defendant Levi Rock and mother-in-law of the defendant Lena Rock. Gilbert Rock, a witness sworn on the trial, is the husband of plaintiff and the father of the defendant Levi Rock and father-in-law of the defendant Lena Rock. On the 27th day of April, 1903, Sarah Ann Baker of the State of Illinois deeded to the defendant Levi Rock the real estate and premises described in the complaint in this action. Plaintiff claims to own this real estate upon which defendants reside and possession of which they have had since the date of the aforementioned deed, April 27, 1903, and which deed was recorded in the Clinton county clerk's office May 25, 1903. Plaintiff bases her claim of title, *first*, upon a deed dated May 23, 1903, two days before the deed to defendant Levi Rock was recorded, purporting to have been given, made and executed by the defendants to Gilbert Rock, which deed was not recorded until November 7, 1917, and by him conveyed to plaintiff by deed dated November 8, 1917, and recorded on that day in the Clinton county clerk's office. The trial of the action commenced on the 16th day of April, 1919, and resulted in a verdict of the jury in favor of the defendants. Motion was made by the plaintiff to set aside the verdict and for a new trial, which was denied. The only question litigated was, whether defendants signed, acknowledged and delivered the deed to Gilbert Rock, Jr., called herein Gilbert Rock. The notary whose name was signed to the acknowledgment on the alleged deed to Gilbert Rock was called in behalf of the plaintiff and testified that it was his signature to the acknowledgment, but while he remembered the parties being before him some time for some business about papers they wanted executed

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he did not remember anything about a deed, and had no recollection except that it was his signature to the acknowledgment. Plaintiff and his wife testified that they were present and that the plaintiff furnished the money. Defendants deny that any such transaction took place, and that they never heard anything of the transaction nor knew anything about it until some time before, when the defendant Levi Rock had some trouble with plaintiff over wages he claimed she owed him. The defendants denied that they signed the deed. Defendants called a witness who was present at a meeting of all the parties here concerned, when some papers were being made regarding the property of the parties (plaintiff and her husband), and he asked them about the Beartown lot (the lot in question) and they said it belonged to Levi, and that lot was not included in the disposition then made. This occurred four or five years before the trial of this action. The purported deed was signed, apparently, by the parties by their mark. The evidence as to who wrote the defendants' names is found in the testimony of the witness Agnew, who swore he drew the deed and wrote the name of Levi Rock, but did not make the mark nor write the name of the wife; it was not executed before him. The notary swore that none of the instrument was in his handwriting except his signature as notary. Lena Rock swore she never was in his office. Another witness swears that she furnished part of the money to the defendants when the land was purchased of Mrs. Baker. While Levi Rock can sign his name and did so upon the trial, the signature so made being produced upon the argument upon appeal, it appeared that he did some times sign by mark. His signature made upon the trial is clear, well written and shows no necessity for signing by mark. The evidence shows that this property was assessed to defendant Levi Rock, and that he paid the taxes; that he always, since acquiring the title in 1903, occupied the premises; that he exercised all acts of ownership over it, even after he had trouble with the plaintiff. The jury saw the parties and evidently thought defendants were the rightful owners. Appellant urges that, even if the defendants produced the preponderance of evidence, on account of the certificate of acknowledgment the judgment should have been for plaintiff; that the proof was not so clear and

convincing as to amount to a moral certainty that the defendants were right. Section 935 of the Code of Civil Procedure provides that "A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof." Section 936 of the Code provides that "the certificate of the acknowledgment, or of the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby." In 1896 the Court of Appeals laid down the general rule (*Albany County Savings Bank v. McCarty*, 149 N. Y. 71, at p. 80 of the opinion) contended for by the plaintiff, appellant, here, viz.: That such certificate "should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty." That case is the leading authority in this State and collates and reviews decisions previously had upon the question, not only in this State, but in several other States. Applying the reasoning to the case then before the court, it was held that "While the evidence is not conclusive, as the statute provides that 'it may be rebutted and the effect thereof contested by a party affected thereby,' it is of such a character as, standing alone, to send a case to the jury, so that they may decide between the probative force of the certificate, supported by the presumption that it states the truth, on the one hand, and the evidence produced in rebuttal, whatever it may be, on the other." The court did not disturb the finding of the referee on that point; but did reverse the judgment on errors in rejection of evidence. That case holds that the act of taking an acknowledgment is not judicial but ministerial in its character. (Page 83 of the opinion.) Appellant contends that the case in the Court of Appeals here referred to is the law of the State; hence, what is the effect of the general rule laid down? (Page 80.) The evidence must not be of doubtful character; it must not be the unsupported testimony of interested witnesses, and finally it must be more than a bare preponderance of evidence. It is then stated, "but

only on proof so clear and convincing as to amount to a moral certainty." It means evidence of probative force, and yet, when the judgment of the Court of Appeals is finally reached, it is said in effect, and in many other cases in so many words, that sections 935 and 936 (*supra*) make a certificate of the notary *prima facie* proof only, and as such takes the case to the jury. (*Rogers v. Pell*, 154 N. Y. 518, 530.) In *Marden v. Dorthy*, No. 2 (12 App. Div. 188) it is said the introduction of the certificate makes out a *prima facie* case the same as evidence of a disinterested witness. In *Uvalde Paving Co. v. City of New York* (99 App. Div. 327, at p. 333 of the opinion) it is said the certificate raises a presumption of due execution and that such presumption must be weighed against the opposing evidence. (*Stainton v. Kaiser Improvement Co.*, 161 App. Div. 603.) This case holds that 149 New York, 71 (*supra*) is to the effect that the certificate raises a question of fact. In the final analysis, subject to the rule laid down in 149 New York, 71, as interpreted by these later cases, the case under consideration was properly submitted to the jury, and there was more than a bare preponderance of evidence, supported by disinterested witnesses. It was for the jury to decide whether the proof thus submitted, having seen the parties and the witnesses and their manner of testifying upon the stand, was so clear and convincing as to amount to a moral certainty. Appellant invokes the rule that, the deeds having been recorded, delivery is presumed. That is a sound rule, but the jury having found that the defendants did not execute, acknowledge and deliver the deed upon which plaintiff's title depends, it has no application here. (*Caccioppoli v. Lemmo*, 152 App. Div. 650.)

The judgment should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

OSCAR WARNER, as Administrator, etc., of SCENA MUSHAW,
Deceased, Appellant, v. JACOB BRILL, Respondent.

Third Department, January 5, 1921.

Motor vehicles — action against owner of car for death of occupant — effect of release given to owner of another car involved in same accident — verdict not against weight of evidence — objection to charge of court as to joint tort feasons not taken at trial not available on appeal.

In an action to recover for the death of the plaintiff's daughter it appeared that she was riding in the defendant's car and that as the defendant attempted to pass another automobile to the left his car went off the macadam road into a depression or ditch and struck a telephone pole head-on throwing the plaintiff's daughter from the car and killing her; that the principal defense interposed was that the negligence of the owner of the other car in forcing the defendant off the road caused the accident, and that the plaintiff had settled with said owner for a substantial sum.

Held, that the verdict in favor of the defendant was not against the weight of the evidence.

The release given to the owner of the other car did not preclude the plaintiff from bringing this action inasmuch as it is expressly provided by sections 230 and 231 of the Debtor and Creditor Law that a joint debtor may make a separate composition with his creditor, and that a composition as made does not impair the creditor's right of action against any other joint debtor, unless an intent to release or exonerate him appears affirmatively upon the face of the instrument.

However, by virtue of section 232 of the Debtor and Creditor Law, the defendant had the right to interpose the defense that the owner of the other car was the one whose negligence caused the accident, and that the defendant was not negligent.

The failure of the plaintiff to except to the charge of the court in submitting the question of joint tort feasons to the jury precludes him from raising on appeal any objection thereto.

APPEAL by the plaintiff, Oscar Warner, as administrator, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Fulton on the 17th day of December, 1919, upon the verdict of a jury, and also from an order entered in said clerk's office denying plaintiff's motion for a new trial made upon the minutes.

Eugene D. Scribner, for the appellant.

Ainsworth, Carlisle, Sullivan & Archibald [*John N. Carlisle* of counsel], for the respondent.

KILEY, J.:

The plaintiff in this action is the father and administrator of the estate of his deceased daughter, Scena Mushaw. The action is brought against the defendant, based upon an allegation of negligence on the part of the defendant in so driving a car in which the said Scena Mushaw was riding with him, in such a negligent manner that she, with others, was thrown out, all injured, and she killed. The facts, briefly, are these: On the 2d day of September, 1918, the respondent was driving on the macadam highway leading from Mayfield, N. Y., to Gloversville, N. Y., in Fulton county. He had riding with him plaintiff's intestate and others. His car was a Chevrolet. Ahead of him and going in the same direction was one Conrad Hartung driving a Buick car. The defendant attempted to pass him to the left and went off from the macadam into the depression or ditch and struck a telephone pole head-on. The appellant's intestate was thrown out and killed. The charge against defendant is that he negligently drove the car at an excessive rate of speed and was careless in handling and driving his car and thus was responsible for the injury that occasioned the death of Scena Mushaw. Respondent's evidence is to the effect that Hartung turned his car to the left when respondent tried to pass him, and collided with him, forcing him off the road so that he collided with the telephone pole. Defendant in his answer alleged and it was proved upon the trial that defendant, this plaintiff and the other occupants of the car brought actions against Conrad Hartung, driver of the Buick car, for damages, charging negligence, and settled with Hartung for a substantial sum. The position of the respondent, under this allegation, is that if he was negligent, Hartung was also negligent, and that they were joint tortfeasors. The trial judge submitted that question to the jury, instructing the jury that if they were joint tortfeasors, plaintiff could not

recover; that if they were joint tort feorsors, the release of one released both. The question of Hartung's negligence was also submitted to the jury. Appellant urges that the verdict is against the weight of evidence, and that the court erred in submitting the question of the negligence of Hartung and defendant, as to whether they were joint tort feorsors, claiming that plaintiff had the right to settle with Hartung and also collect from defendant for the same injury. The verdict is not so against the weight of evidence that it should be disturbed upon this appeal. The other question urged as sufficient for a reversal of the judgment has had, from early times, a stormy course through the courts of this country and England. In this State the doctrine governing the liability of joint debtors, sometimes called joint tort feorsors, was formerly found in sections 1942-1944 of the Code of Civil Procedure, now found in sections 230 to 233, inclusive, of the Debtor and Creditor Law and in section 1943 of the Code of Civil Procedure (as amd. by Laws of 1909, chap. 310). Section 230, so far as applicable here, reads as follows: "A joint debtor may make a separate composition with his creditor. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness or other instrument exonerating him therefrom." Section 231 reads as follows: "An instrument making a composition with a creditor does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him, appears affirmatively upon the face thereof." *Gilbert v. Finch* (173 N. Y. 455) and *Walsh v. N. Y. C. & H. R. R. Co.* (204 id. 58) discuss the interpretations that should be given to the provisions of the two sections quoted and to the other sections to which I have hereinbefore referred, sections 232 and 233 of the Debtor and Creditor Law (sections 1942, 1944 of the Code of Civil Procedure before they were transferred under the above-named title). The release in this case reads as follows:

"*Know all men by these presents*, that I, Oscar Warner, as administrator of the goods, chattels and credits of Scena Mushaw, deceased [plaintiff in this action], for the sole consideration of \$1.00 and settlement made in the case of

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Anthony Mushaw, an infant, to me in hand paid by Conrad Hartung, have released and discharged, and by these presents do for myself, my heirs, executors, administrators and assigns, release and forever discharge the said Conrad Hartung of and from all claims, demands, damages, actions, or causes of action, on account of injuries resulting, or to result from an accident to Scena Mushaw, which occurred on or about the 2nd day of September, 1918, by reason of accident near Gloversville on the State road and of and from all claims or demands whatsoever in law or in equity, which I, my heirs, executors, administrators or assigns can, shall or may have by reason of any matter, cause or thing whatsoever prior to the date hereof."

[Signed and sealed.]

This release runs to Conrad Hartung alone, and did not preclude the plaintiff from bringing this action. However, we find section 232 of the Debtor and Creditor Law providing as follows: "Where a joint debtor including a partner has compounded, a joint debtor who has not compounded, may make any defense or counterclaim, or have any other relief, as against the creditor, to which he would have been entitled, if the composition had not been made." While the evidence of all that took place before the accident and since, down to the trial, was given in evidence, the principal defense of this respondent was that Hartung was the one whose negligence caused the accident. If there is any error in the submission of the question of joint tort feorsors, as presented in the charge of the court to the jury, it does not avail the appellant here; he apparently acquiesced in the theory followed by the court and did not except to the charge. He cannot raise it for the first time on appeal.

The judgment should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

CHARLES W. STONE, Appellant, v. MOLBY BOILER COMPANY,
Inc., Respondent.

Third Department, January 5, 1921.

Sales — action for breach of warranty of house-heating plant — defense that plant was sold to and warranty given to dealer and not to plaintiff — interpretation of contract of warranty — right to repudiate contract for breach of warranty not waived — offer to return defective plant not necessary where defendant refuses to receive — verdict against weight of evidence.

In an action to recover for breach of warranty of a steam boiler purchased by the plaintiff from defendant for the purpose of heating the plaintiff's house, the defense interposed by the defendant that the warranty was not made to the plaintiff but to the local dealer, who arranged for the purchase of the boiler as plaintiff's agent, because, by the rules of the trade, the defendant could not sell his product to an individual but must sell to a dealer or contractor, is not maintainable where there is no evidence that the plaintiff had knowledge or consented to be bound by any such rule.

The interpretation of the specification in the guaranty that "all our ratings are for direct radiation, figured to heat building to 70° Fahr.," given by the defendant to the effect that the guaranty was only for the heating of the surface of the radiation and not for the heating of the building, was not controlling, and the contract itself and the acts of the parties and other evidence establishes that such was not the proper interpretation.

The use of the boiler after a test made by the defendant's president, which showed that it could not heat the house of the plaintiff, did not waive the plaintiff's right to repudiate the contract, for at the time of the test the defendant took the position that when the house was fully completed and furniture in, and the family settled down to normal life, the plant would do the required work.

It was not necessary for the plaintiff to offer to return the boiler to the defendant in order to maintain an action for breach of warranty since the defendant repeatedly refused to receive it if it was returned.

The verdict of the jury in favor of the defendant was against the weight of the evidence.

APPEAL by the plaintiff, Charles W. Stone, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Schenectady on the 25th day of February, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the 27th day of February, 1920, denying plaintiff's motion for a new trial made upon the minutes.

Naylon, Robinson & Maynard [Daniel Naylon, Jr., of counsel], for the appellant.

Bartholomew Foody, Jr., for the respondent.

KILEY, J.:

Plaintiff's motion for a new trial should have been granted; it was denied. The verdict for the defendant dismissing plaintiff's complaint is overwhelmingly against the weight of evidence. The plaintiff, appellant, resides in the town of Niskayuna, Schenectady county. In the summer of 1917 he built a new house near his former residence in said town and county. He employed one J. E. Harbison, a plumbing and heating contractor, of Schenectady, to superintend and oversee the installing of a heating plant in the new house. Appellant selected the "Molby Down Draft Boiler" as the type he wanted; he authorized Harbison to procure such boiler with accessories that made a complete furnace. A heating inspector of Brooklyn prepared the plans for the heating plant. With these plans in his possession, in the month of March, 1917, Harbison went to defendant's place of business in Brooklyn, N. Y., and told its president that he wanted one of its make of boilers to install in the heating plant of plaintiff in the house that was then being constructed. He dealt with the president of the defendant, informing him that he represented the plaintiff and was acting for him. Defendant sold the boiler and accessories to the plaintiff in accordance with the guaranty set forth in the complaint in this action. That there might not be any mistake about the guaranty and its scope, and before the boiler was paid for, and at a time when a test, satisfactory to the plaintiff, could not be made, defendant, through its president, wrote to appellant as follows:

"NEW YORK, 11/27/17.

"W. C. STONE c/o JOHN E. HARBISON,

"Schenectady, N. Y.:

"DEAR SIR.—In connection with the S-1031 Molby Boiler installed in your residence in Schenectady. We are pleased to guarantee the boiler capable of carrying the radiation as specified when the building is furnished and occupied and the apparatus working under normal conditions. We guarantee

the boiler free from defects in manufacture and will replace any parts so found defective. *Our guarantee in the catalogue is to be considered part of this guarantee.*

“Very truly yours,

“MOLBY BOILER CO., INC.

“E. MOLBY.”

Attached to the guaranty and a part of it is a schedule marked “Ratings,” and provides “*all our ratings are for direct radiation, figured to heat building to 70° Fahr.*” This is important in view of the position taken by the defendant in giving its evidence. This boiler was received in the early fall or late summer of 1917; the first fire was built in September, 1917, and it did not work satisfactorily and the president of the defendant came to the house in 1917 and a test was made by him. It seems to have been mutually agreed that the conditions prevailing were not such that a fair test could be made of the plant; the house was more or less open, windows not in, and the decision on the test was deferred until a later date; plaintiff kept trying to fire the boiler and get up steam. There was not to exceed 2,500 feet of radiation in the house; the boiler in question was rated to have a steam capacity of 4,050 feet. About November 23, 1917, the defendant's president, Mr. Molby, came on again for another test; the house was then practically inclosed; the windows, except two or three in the upper part, were covered with sized factory cloth, the boiler was cleaned out, and coal procured, such as was designated for use in this boiler by the specifications in the guaranty; the test, lasting three or four hours, was made; the plant did not heat the building. The family had not moved in at that time; the interior finish was not completed; floors not all laid, much inside work yet to be done, and again it appears from the record that it was mutually agreed that the conditions were not ideal for the test. This test was made by the defendant's president and without any fault being found by him as to any defect in the heating system or facilities furnished for making it. The defendant taking the position that, when the house was completed and furniture in and family settled down to normal, every day life, the plant would do the work required to heat the house. The workmen

continued to work in the house during that winter. The record is replete with continued effort to get heat out of the furnace and into the system; forty tons of pea coal were purchased and continual attention, in accordance with the printed and oral instruction furnished by the defendant, was given to the work; while it burned coal it did not force heat into the radiation sufficient to furnish moderate heat and warmth. The boiler continued to loose water, the water line did not hold up; the men were afraid to run it; the water line fluctuated rapidly, sometimes disappearing from view; the water line is what is usually called the "gauge," and is the indicator or indicates the correct conditions prevailing or not prevailing, when the boiler is in operation. In the meantime the defendant was calling for payment. It fairly appears from the evidence that in December, 1917, payment was made, with the understanding that such payment should in no way preclude the plaintiff from insisting that the defendant perform on its part according to the terms of the guaranty. The house was not complete until the summer of 1918, when furniture was moved in, and the family commenced occupation. Conditions, both oral and written, were then complete. Fire was started in the boiler and as cold weather came on it did not furnish heat. The evidence, by every reasonable intendment, shows that reasonable, fair and intelligent effort was put forth by the plaintiff to use the boiler after the fire was lighted in the fall of 1918. He notified the defendant that he had failed; that its boiler would not heat the house, and asked that a representative of the defendant come there and see for himself; that he would have to take the boiler out, and asked for shipping instructions. Defendant replied that it would not accept the boiler, and refused or neglected to give shipping instructions. Plaintiff took the boiler out and installed another and sued defendant for breach of its warranty and for damages with the result aforesaid. Upon the trial defendant found no fault with the system of radiation furnished by plaintiff to go with this boiler. The defense was that the boiler was sold to Harbison, and not to plaintiff; that if it made a guaranty, which it denies, as interpreted by plaintiff, it was made to Harbison; that the boiler was as guaranteed, as it interprets it, and that faulty operation and

fuel was the approximate cause of the failure; that plaintiff waived his right to repudiate the contract by continuing the use of the boiler after he had discovered the imperfections; and finally that plaintiff did not give reasonable notice of the breach. The evidence of both plaintiff and defendant proves that Harbison was acting for the plaintiff, the defendant advancing the information and reason why Harbison did not act as agent that by the rules of the trade it could not sell to an individual, but must sell to a dealer or contractor. I know of no law that permits a union or organization of dealers in building supplies to formulate rules that limit or destroy the law of the land; the jury should have been instructed to that effect; there is no evidence that plaintiff had knowledge or consented to be bound by any such rule. As to the question of guaranty, that is not seriously denied; but defendant contends that it involves only the heating of the surface of the radiation and has nothing to do with the heating of the building in which the boiler is installed. The defendant's president swore, in effect, that it did not concern it whether the plant, equipped with its boiler, heated the building when it was installed or not; that each boiler was given the maximum rating attained under the most favorable conditions of fuel and atmosphere that could be had; and that the purchaser must know that and make due deduction on account of such false representation, or suffer the consequences. There was only one witness sworn for the defendant, viz., its president, and it would seem these last two explanations as to trade rules and his interpretation of the guaranties made is at the foundation of all of this most strange and, under the circumstances, novel evidence. The question is not how defendant interpreted its contract, but how, after reading this clause in the specifications of its guaranty, viz., "All our ratings are for direct radiation *figured* to heat building to 70° Fahr.," an ordinary intelligent purchaser would be justified in interpreting it. The ordinary jury, without minute and detailed instruction, could not be expected to see and consider the force of the limited construction put upon its contract by its witness. That such narrow interpretation by the defendant of its contract with the plaintiff was wrong appears from the contract itself, from the acts

of the parties and from the evidence. As to faulty fuel or operation, the evidence shows, and it is not contradicted, that after the November, 1917, test, competent men and fuel were furnished and the printed instructions of the defendant were followed. As to the use of the boiler after the November, 1917, test waiving plaintiff's right to repudiate the contract, there is a rule, as old as the law of any civilized nation, that when, by acts or statements, one party lulls another into a sense of security as to his existing right, such party cannot then take advantage of such other party, to his detriment, and thus advantage the alluring party, in his own behalf, to destroy those rights. There was but a weak denial, if any, of the evidence given by plaintiff showing the understanding between the parties that any rights plaintiff had were not to be waived by payment or while he was trying to make the boiler operate. Defendant here urges that the plaintiff is confined to the remedy given him under section 150 of the Personal Property Law (as added by Laws of 1911, chap. 571), known as the Sales of Goods Act. That act did little more than codify the case and statute law theretofore existing, and plaintiff's procedure does not offend its provisions. He did offer to return the boiler; defendant refused to receive it if it was returned; he was not called upon to do a useless act after such refusal. Under the circumstances, the holding of the jury that he did not give notice of his rescission within a reasonable time was against the weight of evidence. Time alone is not the essence of the force that destroys the effectiveness of a notice or, in this case, the notice. The delay was due to the representations of the defendant; any finding to the contrary is against the weight of evidence as it appears from this record. Under the charge of the court the jury must have found against the plaintiff upon every proposition; the plaintiff did everything he could, working, according to suggestions and instructions of the defendant, to make the boiler a success. I cannot escape the conclusion that this verdict is against the weight of the evidence. I am not unmindful of the fact that we cannot substitute our judgment for that of a jury; we do not do that or intend to, but it is the right of the respondent to know wherein we think the verdict is against the weight of evidence. That is all we are trying to do here.

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concur.

Judgment and order reversed and new trial granted, with costs to the appellant to abide the event.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of JOSEPH F. BRADY, Respondent, for Compensation under the Workmen's Compensation Law, v. HOLBROOK, CABOT & ROLLINS CORPORATION, Employer and Self-Insurer, Appellant.

Third Department, January 5, 1921.

Workmen's Compensation Law — fracture of lower end of bone of right leg — amputation of leg at middle one-third of right thigh because of existence of malignant bone cancer — award for loss of leg reversed.

An award for the loss of a leg should not be made where it appears that the claimant fractured the lower extremity of the right femur and that the amputation of his leg at the middle one-third of the right thigh was made necessary because of the existence of a malignant bone cancer which was discovered after the fracture.

H. T. KELLOGG, J., dissents.

APPEAL by the defendant, Holbrook, Cabot & Rollins Corporation, from a decision and award of the State Industrial Commission made on the 12th day of May, 1920.

Adolph Hansen, for the appellant.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, and *Bernard L. Shientag* of counsel], for the respondents.

KILEY, J.:

From the employee's claim for compensation, as appears in the record, we find the accident occurred on the 29th day of January, 1919, under the following circumstances: Claimant was at work for the appellant, employer and self-insurer, in the new Broadway subway at Forty-third and Forty-fourth

streets, New York city, and his occupation was that of store-room keeper. On the day in question he says he was walking along a dark passageway, where there was an incline, and that he miscalculated as to his exact location, and stepping into space fell down the incline and fractured the lower end of the bone in his right leg. Evidence shows that it was the femur. He was taken to the Roosevelt Hospital. There the injury was diagnosed as a "pathological fracture lower extremity right femur." After careful examination of the leg at seat of injury, including the X-ray, it was discovered that he had a well-developed bone cancer at the seat of injury; amputation of the leg at middle one-third of right thigh was immediately had; this was deemed necessary because the growth so discovered was malignant. The evidence given previous to May 5, 1920, was to the effect that the injury had nothing to do with the presence of the cancer and was not the cause of the amputation of the leg. Notwithstanding such evidence, the Commission made an award to claimant as and for the loss of the leg. The employer appealed to this court and the appeal was heard at the November term, 1919. The award was reversed. (189 App. Div. 405.) Mr. Justice WOODWARD, writing for the court, Mr. Justice LYON dissenting, said that the damage caused by the cancer was not compensable; that the cancerous condition, existing before the injury, was the only justification for the amputation of the leg. It is suggested in the opinion that an award might have been made for the accident; but it is expressly held it could not be made for the loss of the leg. As I read the former holding of this court (189 App. Div. 405, *supra*), an award can be made as for a fracture of the lower extremity of right femur and the loss resulting therefrom and occasioned thereby, independent of, and not influenced by, the presence of the cancerous condition of the bone and the consequent amputation. The case was sent back to the Commission and some months after a hearing was had at which Dr. Lewy was examined and testified. Before the taking of testimony was commenced, Mr. Shientag, of counsel for the Commission, said: "My own feeling is that I want to ask Dr. Lewy to testify what in his opinion was the probable period of disability in a case of this kind, and have those facts in the record, and go

up to the Court of Appeals on it." Dr. Lewy did not see the injury nor the claimant before amputation and necessarily testified from the record previously made up and upon hypothetical questions. He said the surgical disability would be three months, convalescing period six months additional, and that there would be a permanent defect, evidenced by shortening of the leg, involving the knee joint, causing a loss of function which would be a vocational defect. He also said that from his past experience the condition which he found here would amount to about the loss of half the leg. The last award was for the entire loss of the leg, same as first made by the Commission. The ruling of this court on the former appeal limited the compensable injury to the fracture, exclusive of the bone cancer or any results flowing therefrom. It is not ambiguous, and is controlling here.

The award should be reversed and the case remitted to the Commission with instructions to take evidence, if necessary, and make findings in accordance therewith.

All concur, except H. T. KELLOGG, J., who dissents and votes for dismissal.

Award reversed and matter remitted to the Commission with instructions to take evidence, if necessary, and make findings in accordance therewith.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of CHRISTINE HOFFMAN, Respondent, for Compensation under the Workmen's Compensation Law, for the Death of Her Son, WILLIAM HOFFMAN, v. ROBERT VAN BENTHUYSEN COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.

Third Department, January 5, 1921.

Workmen's Compensation Law — when mother not dependent on son.

The claimant was not dependent on her son at the time of his death since the evidence shows that at that time she was receiving from her husband and several children approximately one hundred dollars per week and that

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she was the owner of two houses with an equity of several thousand dollars and with an income therefrom of approximately fifty-four dollars per week.

APPEAL by the defendants, Robert Van Benthuyesen Company and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 29th day of March, 1920.

Bertrand L. Pettigrew [*Walter L. Glenney* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, and *Bernard L. Shientag* of counsel], for the respondent State Industrial Commission.

William V. Hagendorn [*Joseph M. Conroy* of counsel], for the claimant, respondent.

KILEY, J.:

The claimant is the mother of William Hoffman, who was an electrician's helper, and worked as such for the appellant employer, whose place of business is 243 Canal street, New York city. He was twenty-two years old, and on the 9th day of December, 1919, while engaged at his regular employment, for his employer, at Upper Nyack, N. Y., fell into the water and was drowned. The Industrial Commission has made an award to claimant, his mother, as a dependent at the time of his death of five dollars and seventy-seven cents a week. The insurance carrier resists payment upon the ground that the evidence does not warrant the conclusion that claimant was dependent upon the deceased at the time of his death. The evidence in this case shows that the claimant was the business end of a large family, and at the time of the death of William her husband earned twenty dollars a week and gave it all to her; that William, the deceased, was earning twenty dollars a week and that he gave it all to the claimant; her son Herman gave her seven dollars a week for his board; her son Charles gave her seven dollars a week for his board; she expected ten dollars a week from Henry; her son George pays her fifteen dollars to eighteen dollars a week; her daughter Margaret was earning ten dollars a week and gave it all to claimant; Ferdinand earned ten dollars a week and gave it all to her;

for all paying over seven dollars she purchased their clothes and paid car fare. She purchased two houses, one in which the family lived, a double house, for which she agreed to pay five thousand and fifty dollars, and rents part of that house for fourteen dollars and fifty cents a month. Nine years before William's death she purchased another house for which she agreed to pay six thousand dollars and for which she was receiving forty dollars or forty-one dollars a month rent. Upon this property which she had acquired she had paid, out of this income down to the time of William's death, sufficient so that she had an equity of three thousand four hundred and fifty dollars in the property at the purchase price, which in 1919 must have advanced in value considerably over the sum, and she was making her payments regularly at the time of the hearing in March, 1920. The title was in claimant; she was fifty-four years old; her husband was sixty-one years. If we could calculate with the future in view, this award might be upheld, but it is conditions at-time of the accident which resulted in death, under the Workmen's Compensation Law, with which we have to reckon. (Workmen's Compensation Law, § 16, subd. 4, as amd. by Laws of 1916, chap. 622.) Turn these facts which way you will, the inference is irresistible that because two of the boys anticipated marriage, thus decreasing her income, claimant anticipated that in the future she would not be able to save as much as she had in the past to pay upon her real estate investments.

Respondent's attorney, William V. Hagendorn, put in a brief citing as authority *Matter of Hendricks v. Seeman Bros.* (170 App. Div. 133); *Matter of Rhyner v. Hueber Bldg. Co.* (171 id. 56) and *Matter of Walz v. Holbrook, Cabot & Rollins Corp.* (170 id. 6), which come perilously near sustaining respondent's contention. I think *Birmingham v. Westinghouse Electric & Mfg. Co.* (180 App. Div. 48); *Wilkes v. Rome Wire Co.* (184 id. 626) and *Frey v. McLoughlin Bros., Inc.* (187 id. 824), are controlling. These authorities seem to be applicable to the facts presented here.

The award should be reversed and the claim dismissed.

All concur.

Award reversed and claim dismissed.

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First Department, February, 1921.

MORRIS ASINOF & SONS, INC., Appellant, v. CARL FREUDENTHAL, Respondent.

First Department, February 4, 1921.

Sales — action by buyer for failure of seller to accept and pay for merchandise — correspondence between parties establishing making of contract.

In an action by the seller against the buyer to recover damages for failure to accept and pay for merchandise, correspondence between the parties for the purpose of reducing to writing a contract which they had made through a broker, examined and held, to show *prima facie* the making of the contract.

A formal answer by the seller to a letter of the buyer which would have merely been a reiteration of the seller's consent to the buyer's proposition with respect to the time of payment was not a condition precedent to the making of a valid contract.

APPEAL by the plaintiff, Morris Asinof & Sons, Inc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 20th day of October, 1919, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case.

Louis Salant of counsel [*Morton Stein* with him on the brief], for the appellant.

Jacob H. Corn of counsel [*Siegel, Corn & Siegel*, attorneys], for the respondent.

LAUGHLIN, J.:

This is an action by the seller of merchandise against the buyer thereof to recover damages for his failure to accept and pay therefor. The complaint, as amended by consent on the trial, is on a contract alleged to have been made between the parties on or about the 20th day of December, 1917, by which the plaintiff agreed to sell and deliver to the defendant, and the defendant agreed to purchase, two hundred and eighty pieces of mackinaw cloth, consisting of about forty-five yards to the piece, at the agreed price of \$2.50 per yard, delivery

f. o. b. New York, \$5,000 to be paid in cash immediately upon receipt of the invoices by the defendant and the balance to be paid on or before January 5, 1918, with a proviso by which plaintiff was to be released from liability with respect to fifty-one pieces of the cloth, which then were in transit to the plaintiff, in the event that they were not received by it, and the defendant was given an option to take any or all of seventy-five additional pieces at the same price in case they should be received by the plaintiff as expected. At the suggestion of the defendant, who claimed that the minds of the parties had not met on a binding contract, the evidence with respect to the contract was presented in order that the point concerning the sufficiency thereof might be presented without incumbering the record with other evidence relating to the tender of performance by the plaintiff, its readiness and ability to perform and its damages.

At the close of the evidence offered by the plaintiff with respect to the making of the contract, the complaint was dismissed on defendant's motion. The only point presented by the appeal, therefore, is whether the evidence shows *prima facie* the making of the contract. Plaintiff is a domestic corporation and its place of business was at the city of New York and the defendant was engaged in business at Baltimore, Md., under the name of L. Freudenthal & Son. It appears that the preliminary negotiations for the contract were had through a broker.

On the morning of the 21st of December, 1917, plaintiff wrote and mailed to the defendant a letter referring generally to the agreement made through the broker and inclosing invoices for 280 pieces of the cloth, and stating that it had on hand ready for shipment 229 pieces and had invoices for 51 additional pieces which were in transit and which it expected to receive within a few days, the total net amount of the goods invoiced as \$32,230.63, and stated that the terms of sale were that defendant should send a check for \$5,000 upon receipt of the invoices and remit for the balance by January 1, 1918, and that it was understood that if any of the 51 pieces should be lost in transit, plaintiff was not to be held responsible and that it was expecting 75 additional pieces, and that defendant could have them when received

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if he wanted them, and that the goods would be packed ready for shipment at defendant's disposal f. o. b. New York. Apparently there was no understanding as to which of the parties should communicate with the other first, for the day before the plaintiff so wrote the defendant, the defendant wrote the plaintiff confirming the order placed through the broker, but stating that the order was for 342 pieces, and with respect to the terms, stated the price the same as the plaintiff claimed and that a check was to be sent for \$5,000 on receipt of the invoices, but stating that the balance was to be paid *between* January first and January fifth, and the plaintiff was to hold the goods to defendant's order. The letter from the defendant was received by the plaintiff on the afternoon of December twenty-first, after its first letter of that date had been mailed and it thereupon wrote and at about six P. M. that day mailed another letter to defendant acknowledging the receipt of his letter confirming the order, and stating that it was entirely satisfactory with one exception and that was with respect to the number of pieces, and it therein stated that it could not hold itself responsible for the delivery of 342 pieces and that it had in stock 229 pieces and invoices for 51 more, and that there was hardly a possibility of its not receiving them, but that it could not hold itself responsible in case it did not, and it reiterated what had been stated in its first letter with respect to 75 additional pieces and closed by agreeing to deliver the 229 pieces which were on hand, and the 51 pieces when received, and as many of the 75 pieces when received as the defendant desired, and requested an acknowledgment by the defendant to the end that there might be no misunderstanding. On the twenty-fourth of December defendant wrote the plaintiff acknowledging the receipt of its letter of the twenty-first — evidently referring to plaintiff's first letter of that date — and stating that it wished to correct plaintiff's statement as to terms and referred to defendant's letter of the twenty-first, which it was conceded meant the twentieth, confirming the order and stating that the balance over the \$5,000 would be paid by it *between* the first and the fifth of January and not between the date of the letter and the first of January as plaintiff

had proposed, and the letter closed with the following: "Please acknowledge this accordingly and oblige." This letter was not received by plaintiff until December twenty-sixth, and the suggested change by the defendant with respect to the time he was to have to pay the balance had already been assented to by the plaintiff in its second letter of December twenty-first, which evidently had not been received by the defendant when he wrote the letter of December twenty-fourth. The plaintiff, deeming that the defendant in the meantime must have received its second letter of December twenty-first assenting to the only change in the contract suggested by the defendant in this letter of the twenty-fourth of December, did not further communicate with the defendant concerning it; but not having received defendant's check for \$5,000 on account of the invoices inclosed to him with its first letter of December twenty-first, wired him as follows: "Surprised not having received check five thousand dollars. Wire answer." After receiving this telegram, and on December twenty-sixth, defendant wrote plaintiff as follows: "Not having received a reply to our letter of the 24th inst., and as the terms specified by you in your letter of the 21st was not in accordance with our offer of Dec. 20th we herewith return the invoice and cancel the order." It does not expressly appear when the defendant received plaintiff's second letter of the twenty-first, but since defendant's letter of the twenty-fourth referred only to *one* of plaintiff's letters of the twenty-first, the jury would have been warranted in finding that at that time the defendant had only received the plaintiff's first letter of the twenty-first, which showed that plaintiff was only prepared to contract unconditionally for the delivery of 229 pieces of the goods, and that the defendant, by only suggesting that he be given until January fifth to pay the balance, assented to the plaintiff's first letter of December twenty-first with respect to the quantity of goods covered by the sale. The jury would also have been warranted in finding that the defendant before attempting to cancel the contract on December twenty-sixth, had received plaintiff's second letter of the twenty-first, consenting to the time of payment as specified in the defendant's letter of December twentieth and repeated in his letter of December twenty-fourth. That being so, defendant was fully informed

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by plaintiff's second letter of the twenty-first that it assented to the only change in the contract suggested by the defendant, namely, the provision giving him until January fifth to pay the balance; and he received this information by that letter sooner than he could have received it had the plaintiff formally acknowledged the receipt of his letter of December twenty-fourth and repeated therein its assent to the time of payment desired by the defendant, which it had already done by its second letter of December twenty-first. Owing to the twenty-fifth being Christmas and a holiday, plaintiff did not receive defendant's letter of December twenty-fourth until the morning of the twenty-sixth, and at that time it was warranted in assuming that the defendant had received the desired information from its second letter of the twenty-first. In these circumstances, all of the terms of the contract had been definitely agreed to in writing before the defendant attempted to cancel the order; and it would be unreasonable, I think, to hold that a formal answer by the plaintiff to defendant's letter of the twenty-fourth which would have merely been a reiteration of its consent to his proposition with respect to the time of payment, was a condition precedent to the making of a valid contract. (*Crossett v. Carleton*, 23 App. Div. 366; *Orr v. Doubleday, Page & Co.*, 172 id. 97.) The facts here are clearly distinguishable from those presented in *Poel v. Brunswick-Balke-Collender Co.* (216 N. Y. 310), for there the buyer's letter requesting acknowledgment proposed new terms which had not been assented to by the seller. Counsel for the respondent contends that this correspondence does not show a meeting of the minds of the parties with respect to the *quantity* of the goods covered by the order; and that although the defendant, when he wrote the letter of December twenty-fourth, had before him one or both of the plaintiff's letters of the twenty-first stating that plaintiff could not agree unconditionally to deliver 342 pieces of goods, he should not be deemed to have assented thereto by his letter of December twenty-fourth. I am unable to agree with that construction of the letter of the twenty-fourth. The letter is to be given the meaning which the defendant ought reasonably to have understood that the plaintiff would put upon it. (*Moran v. Standard Oil Co.*, 211 N. Y. 187;

Marshall v. Sackett & Wilhelms Co., 166 App. Div. 141; *Grossman v. Schenker*, 206 N. Y. 466; *Wood v. Duff-Gordon*, 222 id. 88.) Either as matter of law or as a question of fact, that letter may be given the construction that the defendant accepted the plaintiff's terms with respect to the quantity of the goods to be delivered, and that he only desired four additional days time within which to pay the balance of the purchase price over the initial payment of \$5,000. It will not do to hold as matter of law, as contended by the counsel for the respondent, that the defendant was holding under consideration the plaintiff's proposition with respect to the quantity of the goods to be delivered, and by his letter of December twenty-fourth merely meant to make an inquiry as to whether plaintiff would be willing to give him until the fifth of January to pay the balance in case he should decide to accept the goods which the plaintiff was willing to agree unconditionally to sell. Good faith which is required in negotiating a contract, certainly will not permit such a construction of the letter as matter of law. It is to be borne in mind that the parties both supposed that they had made an agreement through the broker. The purpose of the correspondence was not to negotiate a new contract but to reduce to writing the contract already made; and, therefore, there is no ground for holding that the defendant merely desired to obtain information to enable him to decide whether or not to make a contract. Moreover, it clearly appears, I think, from defendant's letter of December twenty-sixth canceling the order, that this idea was not then in his mind, for the only ground he assigns for canceling the order is that he had not received a reply to his letter of the twenty-fourth and that the terms specified in the plaintiff's letter of the twenty-first were not in accordance with his offer of the twentieth. In view of the defendant's letter of December twenty-fourth, it may fairly be inferred that the only terms proposed by the plaintiff to which he did not assent were with respect to the time of payment.

Plaintiff, by letter of December twenty-seventh, written on the receipt of the defendant's letter canceling the order, protested against the cancellation of the order and refused to assent thereto and informed the defendant that it was

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holding the goods subject to his order. It appears that there was a rapid depreciation in the market price of these goods and that, I think, accounts for defendant's attempt to cancel the order. It follows that the judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

DONALD SYMINGTON and Others, Copartners, Doing Business under the Firm Name and Style of SYMINGTON, HOFFMAN & Co., Respondents, v. A. STROUD HAXTON, Appellant.

First Department, February 4, 1921.

Pleadings — action for breach of warranty under contract of sale — allegations in complaint as to nationality and non-residence of defendant immaterial — motion by defendant to strike out such allegations.

In an action for breach of warranty under a contract of sale, allegations in a separate paragraph of the complaint that "the defendant was and still is a British subject and a non-resident of the State of New York" are immaterial and should be stricken out on motion by the defendant, although he is under no obligation either to admit or deny them, for he might be prejudiced by permitting such allegations to remain in the pleadings as they might be referred to by counsel during the trial or in some manner brought to the attention of the jury.

APPEAL by the defendant, A. Stroud Haxton, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of November, 1920, denying his motion to strike from the complaint an allegation with respect to his residence and citizenship.

Harry Bijur [*Harold H. Herts* with him on the brief; *Bijur & Herts*, attorneys], for the appellant.

Laurence A. Sullivan [*Harrington, Bigham & Englar*, attorneys], for the respondents.

LAUGHLIN, J.:

This is an action to recover \$100,000 for a breach of warranty under a contract between the parties by which certain personal property was sold and delivered by the defendant to the plaintiffs for \$350,000. In paragraph 1 of the complaint it is alleged that the plaintiffs were copartners and the only allegations in paragraph 2 of the complaint are that the defendant was and still is a British subject and a non-resident of the State of New York. The defendant moved to strike out paragraph 2 and the motion was denied on the ground that all of the allegations of the paragraph are immaterial and that, therefore, the defendant is under no obligation either to admit or deny them and on that theory is not prejudiced. This we regard as bad practice. Doubtless the learned court was right in expressing an opinion that the defendant is not obliged to answer these allegations; but he is entitled to have such immaterial allegations stricken out and should not be subjected to the risk of determining at his peril whether or not they may be deemed material or immaterial by the trial court and if deemed material not denied or whether or not he may be prejudiced thereby. Moreover, it is perfectly plain that these allegations, which are set forth not inadvertently but in a special paragraph were inserted in the complaint for an ulterior purpose and in the hope that the plaintiffs may obtain some undue benefit or advantage thereby through possible prejudice or bias on the part of one or more jurors. Since the pleadings are before the court without being formally offered in evidence, it is manifest that the defendant might be prejudiced by permitting such allegations to remain in the pleadings for they might be referred to by counsel during the trial or in some manner be brought to the attention of the jury. They have no bearing on the issues in the case and are wholly immaterial thereto and should, therefore, have been stricken out. (*Howard v. Breitung*, 172 App. Div. 749; *Bulova v. Barnett, Inc.*, 193 id. 161.) It was no more proper to incorporate them in the complaint than to have specified the defendant's religion or lack of religion or to have incorporated any other allegations calculated and intended to give plaintiffs undue benefit or advantage, not on the merits of their case, but through a possible prejudice that might be

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aroused by such allegations. In *Zobel Company v. Canals* (188 App. Div. 231) we reversed a judgment on the ground that a question was asked with respect to the citizenship of a material witness for a party calculated and intended to convey the impression that the witness was a citizen of a country with which our country was at war. The order should, therefore, be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,
concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Motion to dismiss appeal denied.

JOHN BROWN, Respondent, v. BLANCHE REALTY COMPANY,
Appellant.

First Department, February 4, 1921.

Master and servant — negligence — injury to janitor and superintendent from fall of dumbwaiter — when error to charge as to failure to furnish safe place to work and sound and suitable appliances — duty of employer not absolute.

In an action by a janitor and superintendent against his employer for injuries sustained by the falling of a dumbwaiter caused by the breaking of the rope by which it was operated in which the only basis for liability shown by the evidence was negligence in failing to inspect and repair, it was error for the court to charge the jury that the defendant owed to the plaintiff the duty to furnish a safe place to work and sound and suitable appliances, for the first theory of liability was not applicable to the case and there was no evidence that the dumbwaiter was not properly constructed originally or that the rope when furnished was not suitable for the purpose.

Moreover, the court erroneously instructed the jury that the duty of the employer with respect to furnishing a safe place and sound and suitable appliances was absolute.

APPEAL by the defendant, Blanche Realty Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York

on the 1st day of March, 1920, upon the verdict of a jury for \$4,500, and also from an order entered in said clerk's office on the 19th day of February, 1920, denying defendant's motion for a new trial made upon the minutes.

Frank J. O'Neill of counsel [*Barent L. Visscher* with him on the brief], for the appellant.

Milton Speiser of counsel [*Joseph Speiser* with him on the brief; *Speiser & Speiser*, attorneys], for the respondent.

LAUGHLIN, J.:

Defendant owned the premises known as No. 17 West One Hundred and Thirty-sixth street, borough of Manhattan, New York, and the plaintiff was in his employ as janitor and superintendent thereof, and on the 5th day of August, 1914, while in the basement attempting to pull a dumbwaiter down for the purpose of collecting garbage, sustained injuries by the falling of the dumbwaiter, and this action is brought to recover his damages. On a former trial plaintiff had a verdict, but this court reversed the judgment on the ground that he failed to show the cause of the accident. (184 App. Div. 33.) On that trial it was merely shown that the dumbwaiter stuck at the second floor and that the rope by which it was operated and from which was suspended a weight, was somewhat worn and frayed; but it did not appear that the rope broke or that the dumbwaiter was otherwise out of order than might be inferred from the mere fact that it stuck. On the new trial it was shown that the rope broke near the eye where it was attached to the weight and that it had been so worn before the accident that it was held only by a few strands; and also that the dumbwaiter ran in grooves or tracks and that at times it left the tracks or grooves and became stuck and that the defendant had notice thereof a sufficient length of time before the accident to enable it in the exercise of due diligence to make the necessary repairs before the accident and that it failed to perform its duty in that regard. A cause of action was shown and the recovery could be sustained were it not for an error in the charge to which an exception was duly taken by the defendant which error the court was led to repeat by a request for instructions to the jury by one of the

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attorneys for the plaintiff. In the charge in chief the court instructed the jury that the plaintiff brought the action on the theory that as an employee of the defendant he did not receive the consideration to which he was entitled from the defendant by reason of his employment, and that the law of our State is clear "that an employer is bound to furnish certain materials when calling upon an employee to do certain work. In other words, the employer, the defendant, was required under our laws to have furnished the plaintiff a safe place, so that the work that he was engaged in could be done without injury to himself, the plaintiff." The court then stated the contentions of the respective parties and instructed the jury that the important question for them to determine was what was the condition of the dumbwaiter, and that if it merely slipped and the plaintiff was injured, defendant was not liable, and that the plaintiff's theory was that owing to age and the extent to which the rope had been used it was in such poor condition that it broke. The jury were then instructed that the defendant could only be held liable on the theory of actual or constructive notice of the condition claimed to exist, and further instructed with respect to what constituted actual and constructive notice. Counsel for the defendant duly excepted to that part of the charge in which the court stated "that the employer was required to have furnished a safe place to the plaintiff so that the work engaged in could be done without injury to himself." On the attention of the court being thus drawn to the charge, no modification of the charge was made. The last instructions given to the jury were in charging a request made by one of the attorneys for the plaintiff "that the master, namely, the defendant, owed to the plaintiff the duty to furnish safe place to work, sound and suitable appliances with which to work and is bound to inspect and examine these things from time to time and use ordinary care to discover and repair defects in them." Defendant likewise duly excepted to those instructions and they were left without any modification. Both the court and the attorney for the plaintiff thus injected into the case one theory of liability not applicable to the case and another on which there was no evidence. The doctrine of safe place plainly was inapplicable to these

facts; and there was no evidence that the dumbwaiter was not properly constructed originally or that the rope when furnished was not suitable for the purpose. The only basis for liability shown by the evidence was negligence in failing to inspect and repair. Moreover, the court thus erroneously instructed the jury that the duty of the employer with respect to furnishing a safe place and sound and suitable appliances was absolute, whereas it is well settled that the duty in this regard is merely to exercise reasonable care. (*Maue v. Erie R. R. Co.*, 198 N. Y. 221; *Harley v. Buffalo Car Mfg. Co.*, 142 id. 31; *Quinlivan v. Buffalo, R. & P. R. Co.*, 52 App. Div. 1; *Smidt v. Buffalo Cold Storage Co.*, 158 id. 778.)

It is to be regretted that in a simple action for negligence such as this, it becomes necessary to have a third trial, but we cannot say that these errors were not prejudicial to the defendant. It follows that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ELSA LENTINO,
Respondent, v. CHARLES G. FESER and AIDA FESER,
Appellants.

First Department, February 4, 1921.

Parent and child — habeas corpus proceeding by mother to secure possession of infant daughter dismissed — abandonment of child — validity of voluntary adoption procured without actual or constructive notice to parent — necessity for hearing on issue of abandonment.

A habeas corpus proceeding by a mother to obtain the possession of her infant daughter should be dismissed and a voluntary adoption order procured without actual or constructive notice to the relator should be sustained, where it appears that the relator voluntarily delivered her daughter to the respondents on the understanding and agreement, evidenced by a letter signed by her at a time when she was unable to properly care for the child, that they were to have the custody of the child and the right

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to bring her up as their own; that thereafter the relator abandoned the child to the respondents, husband and wife, who are respectable people with sufficient financial ability to properly care for the child; and that the child's stepfather is a professional gambler now in a State prison and liable to be taken into custody on another charge at the expiration of his sentence.

A parent who has not been heard on the issue of abandonment cannot be concluded by an *ex parte* determination and must be afforded a hearing thereon, either by direct application to the judge who made the order of adoption or, as in this case, in a habeas corpus proceeding.

APPEAL by the defendants, Charles G. Feser and another, from an order of the Supreme Court, made at the Bronx Special Term and entered in the office of the clerk of the county of Bronx on the 12th day of June, 1920, sustaining a writ of habeas corpus and awarding the custody of Louise Phillips, otherwise known as Marie Feser, who is five years of age, to the relator, and declaring null and void an order of the Surrogate's Court of Bronx county permitting the respondents to adopt said child and to have her care and custody.

George M. Curtis, Jr., of counsel [*Curtis, Robson & Collins*, attorneys], for the appellants.

John T. S. Wade of counsel [*Leonard McGee*, attorney], for the respondent.

LAUGHLIN, J.:

The points presented by the appeal concern the right to the custody of the child as between the mother, who is the relator, and the respondents to whom she voluntarily delivered the child on the understanding and agreement, evidenced by a letter signed by her at a time when she was unable properly to care for the child, that they were to have the custody of the child and the right to bring her up as their own, the validity and effect of an order of adoption subsequently procured by them without actual or constructive notice to the mother, and whether it is for the best interests of the child to be left with the respondents to be brought up as theirs or to be returned to her mother.

The relator married one Phillips on January 18, 1913. Two children were born the issue of that marriage, one, Herbert, on the 3d day of December, 1913, and Louise, with whom we are

concerned in this proceeding, on the 1st of July, 1915. Their father died on the 3d of August, 1915. On the 27th of February, 1918, their mother married one Lentino, a gambler by profession, who on the 12th of August, 1919, was duly convicted in the Court of General Sessions, New York county, of the crime of having received stolen goods knowing them to have been stolen, for which he was sentenced to be imprisoned in a State prison for not less than one year and six months, nor more than three years, and when the order herein was made he was still serving his sentence. A bench warrant has been issued for his arrest under an indictment for grand larceny, under which he will probably be taken into custody at the expiration of his present sentence. If not, or when he obtains his liberty, the relator contemplates resuming marital relations with him and bringing up her two children by the former marriage and another, a girl born on the 7th of April, 1919, the issue of her marriage with him, under his supervision and as members of his family. It appears that Louise for a period of about six weeks after her birth, during which time the relator was ill, was in the custody of the relator's mother. From June to September, 1918, Louise, with the consent of her mother, was in the care of Mr. and Mrs. Burbank of Brooklyn. Mrs. Burbank died on the 26th of September, 1918, and Louise was then returned to her mother and was afterwards under the care of a Miss Halbach, also known as Von Halbach, for a short time and was then, through the instrumentality of Miss Halbach, also known as Von Halbach, sent by the relator, who had become ill again, to the respondents on the 2d day of October, 1918, with whom and under whose care she has ever since remained at their apartment, No. 1326 Fulton avenue, in the borough of The Bronx. When the relator sent the child to the respondents there had been no interview between her and them and only indirect negotiations through Miss Halbach, also known as Von Halbach, from which the fair inference to be drawn from the evidence is that the respondents were led to believe that the relator was unable to provide a proper home for the child and that they would be permitted to bring her up as their own. About a week after the respondents received the child, one of them called on the relator, evidently with a view to obtaining her consent to the adoption of the child, but

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she was unwilling to give it. On the 26th of November, 1918, relator called at the respondents' apartment and dined with them and remained some hours thereafter and as the result of negotiations between them and her, Mr. Feser wrote on a typewriter a statement which the relator there signed, as follows:

"NEW YORK, November 26, 1918.

"I hereby consent to allow my daughter, Louise, to live with, and be brought up by Mr. and Mrs. Charles G. Feser, 1326 Fulton Avenue, Bronx, N. Y., as I do not love or care for her.

"(Signed) MRS. ELSA LENTINO."

Respondents and the mother of Mrs. Feser thereupon signed the paper as witnesses. The relator concedes that she signed this paper but she testified that, while there, she was given intoxicating drinks and was not in a state of mind fully to comprehend and understand it. That is controverted by the testimony of the respondents, which is also to the effect that they never had or served intoxicating drinks, and they are corroborated by other testimony. All of the testimony introduced on the hearing has been fully considered and we deem it sufficient to state our conclusion with respect thereto without setting it forth or discussing it in detail. It satisfactorily appears that the relator gave the respondents to understand that she was unable to provide for the child and was quite willing and desirous that they should retain the custody of the child and bring her up as their own, and that she voluntarily signed the paper with full knowledge of its contents after she had so agreed with them verbally. It does not appear that anything was then said with respect to their right formally to adopt the child; but the respondent Feser, who drew it, was a salesman of steel supplies and doubtless did not know the formal requirements of the law. After that interview, the preponderance of the evidence shows that the relator abandoned the child to the respondents and never called to see the child or personally made any effort to see her. The relator claims to have called on the respondents thereafter and to have had telephonic conversations with them concerning the child, but that is controverted by them. It was understood at the time the paper was executed that

the relator was to be at liberty personally to call and see the child if she should so desire. The relator's brother at one time thereafter called on the respondents and expressed a desire to see the child but was not permitted so to do, and the respondent Feser wrote relator protesting against this as a violation of their understanding that only she was to see the child. After the paper was executed, the relator frequently changed her residence and resided alone with her child and children after the last child was born, and later on her brother lived with her. She had no means and earned nothing but dressed well and she and the children who were with her were supported solely by contributions from her brother and brothers-in-law. The relator stated in her traverse to the return that she had been informed by her husband that he had inherited from his father about \$30,000, which he expected to receive when released from prison in July, 1920, but on the hearing that was not shown.

On the 25th of June, 1919, respondents presented to the Surrogate's Court, Bronx county, a petition setting forth the time and circumstances under which they received the custody of the child; the signing of the paper under the date of November 26, 1918, by the relator and the circumstances under which she signed it; efforts made by them to ascertain the address of the relator; that the father of the child was dead; that the mother had abandoned her; their ability and willingness to provide for her and give her a home and proper care and attention as if she were their own, and praying that the child's name be changed to theirs and for an order of adoption. Respondents, with the child, appeared before the surrogate, and the court made an order reciting the material facts and that the consent and appearance of the mother were unnecessary because she had abandoned the child, and allowing the adoption of the child by the respondents by a formal adoption signed and proved to have been executed by them and recited in the order. It satisfactorily appeared on the hearing that the respondents are husband and wife and have been during all the times in question; that they are respectable people and have sufficient financial ability properly to care for her and were willing and anxious so to do; that they are fond of the child and the child is fond of

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them and addresses the respondent Mrs. Feser as her mother and manifested affection for both respondents and did not recognize or remember the relator and would not go to her.

This proceeding was instituted by a petition verified by the relator on the 15th of March, 1920, in which she states that she first learned of the order of adoption on the 23d day of September, 1919, and that she had no notice of the application therefor. Section 111 of the Domestic Relations Law (as amd. by Laws of 1913, chap. 569, and Laws of 1915, chap. 352), so far as here material, requires the consent of a parent or surviving parent to the adoption, but expressly provides that the consent of a parent "who has abandoned the child" is unnecessary. Section 110 (as amd. by Laws of 1917, chap. 149)* defines adoption as "the legal act whereby an adult takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor," and provides, among other things, that an adult husband and his adult wife together may adopt a minor, pursuant to the provisions of the adoption article of the Domestic Relations Law, being article 7 thereof. The statute provides procedure for two kinds of adoption, namely, one for the adoption of indigent children from charitable institutions (Dom. Rel. Law, §§ 110, 115, as amd. by Laws of 1917, chap. 149, and Laws of 1918, chap. 280), and another for all other cases which are known as voluntary adoptions (Id. §§ 110, 112, as amd. by Laws of 1917, chap. 149, and Laws of 1916, chap. 453). The proceedings in the case of a voluntary adoption, with which only we are concerned, are regulated by section 112 of the Domestic Relations Law, which provides, if the child is under eighteen years of age, that the foster parent or parents, defined in section 110 as the person or persons who are to adopt, the person to be adopted, and all persons whose consent is necessary under section 111, must appear before the county judge or the surrogate and be examined unless an instrument "containing substantially the consents" required is presented and an agreement on the part of the foster parents for the adoption, signed by, among others, each person whose consent is required by section 111, duly acknowledged.

* Since amd. by Laws of 1920, chap. 433. — [REP.]

If, therefore, the paper signed by the relator on the 26th of November, 1918, could be deemed substantially the consent required by the statute, it is manifest that the adoption order could not be sustained on that theory for it was not executed in the manner required by the statute. It thus appears that the statute authorizes an adoption without consent of the surviving parent, if such surviving parent has abandoned the minor child. The statute contains no express provisions requiring notice to the parent in order that he may be heard on the question of whether or not he has abandoned the child, but, manifestly, without such notice, either actual or constructive, an adjudication cannot be made that will be binding on the parent on that issue. (*Matter of Livingston*, 151 App. Div. 1; *People ex rel. Simpson Co. v. Kempner*, 154 id. 674; *Stuart v. Palmer*, 74 N. Y. 183; *Modern Loan Co. v. Police Court*, 12 Cal. App. 582; *Matter of Johnston*, 76 Misc. Rep. 374.) In many instances it would be impracticable, if not impossible, to give notice of a hearing on such an adoption proceeding to a parent who has abandoned a child, for often the parents are unknown and their whereabouts is unknown, and since the duty devolves on the State to care for such children, it was competent for the Legislature to provide for their adoption without the consent of or notice to the parent, at least when such notice could not be given, on satisfactory proof of the facts which the Legislature deems sufficient. All the facts on which the Legislature dispensed with consent, except abandonment, are matters of record, which could not well be controverted, namely, that the parent had been deprived of his civil rights or divorced for adultery or cruelty, or adjudged insane or to be an habitual drunkard or duly adjudged to be deprived of the custody on account of cruelty or neglect. But a parent who has not been heard on the issue of such abandonment, which might have been controverted, cannot be concluded by the *ex parte* determination and must be afforded a hearing thereon, either by direct application to the judge who made the order, or as here, in a habeas corpus proceeding. (*Matter of Livingston*, *supra*; *Matter of Moore*, 72 Misc. Rep. 644; *Matter of Larson*, 31 Hun, 539; *revd.*, on another point, 96 N. Y. 381; *People ex rel. Cornelius v. Callan*, 69 Misc. Rep. 187; *Matter of Antonopoulos*,

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171 App. Div. 659.) In *United States Trust Co. v. Hoy* (150 App. Div. 621), with respect to adoption from an institution, it was held that the adoption order was valid and binding on the parent, who, however, in that case was deemed represented by the institution which had notice and the adoption was as authorized in such cases and was not on the ground of abandonment by the parent. It is unnecessary to decide whether the relator's only remedy was an application to vacate the order of adoption — a point on which the views of the members of the court are not in accord — for all of the evidence has been taken and we are all of opinion thereon that the relator had abandoned the child prior to the making of the adoption order, and that being the fact, the adoption order should have been sustained and the proceeding dismissed. The delivery of the child to the relator pursuant to the order was stayed pending the appeal and the child is now in the custody of the respondents, where we think she properly belongs.

It follows that the order should be reversed, but without costs, and the proceeding dismissed, without costs.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Order reversed, without costs and proceeding dismissed, without costs.

MARY F. ROBERTS, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, Respondent.

First Department, February 4, 1921.

Vendor and purchaser — mechanics' liens filed between date of contract of purchase and date for closing constitute an incumbrance — right of purchaser to recover back payment on account of purchase price, where vendee refuses to remove such incumbrance and deed is to contain no covenant against incumbrances — necessity of allegation and proof as to purchaser's readiness and willingness to perform.

Mechanics' liens filed against premises between the date of a contract of sale and the date for closing, which were unsatisfied on the latter date, constitute an incumbrance entitling the purchaser to rescind and to

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recover back a payment made on account of the purchase price pursuant to the terms of the contract, where it appears that there was to be no covenant against incumbrances in the deed, and that the vendor although able to remove said liens refused to grant an extension of the time for closing and insisted that the purchaser take title on the mere oral promise of its attorney that he would bond the liens.

The obligations of the parties to an executory contract of purchase and sale are concurrent and dependent, and there can be no recovery of damages for the vendor's alleged breach, without an allegation in the complaint and proof upon the trial of the vendee's readiness and willingness to perform; but a formal tender and demand by the vendee is unnecessary where the vendor in advance refuses to comply with the terms of the contract or where he has placed himself in a position where performance is impossible. MERRELL, J., dissents, with opinion.

APPEAL by the plaintiff, Mary F. Roberts, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of November, 1919, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 23d day of October, 1919, denying plaintiff's motion to set aside the verdict and for a new trial made upon the minutes.

John S. Wise, Jr., for the appellant.

Edward E. McCall of counsel [*George W. Hubbell*, attorney], for the respondent.

PAGE, J.:

On January 2, 1917, William C. Roberts entered into a contract with the New York Life Insurance Company for the purchase of the land and premises known as Madison Square Garden for the sum of \$2,400,000, payable, \$100,000 in cash upon signing the contract, \$300,000 at the time and place of the delivery of the deed, and \$2,000,000 by executing and delivering a bond and mortgage to secure payment of that sum on the 1st day of January, 1922. The New York Life Insurance Company agreed on its part to execute, acknowledge and deliver a proper deed, with covenants only against grantor's acts, for the conveying to Roberts or assigns the fee simple of the said premises, free from all incumbrances, except taxes, assessments and water rates which were payable after the date of the contract, and also subject to certain leases and book-

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ings, a schedule of which was attached to the contract, and which deed was to be delivered on March 1, 1917, at twelve o'clock noon. The contract further provided: "And it is hereby expressly understood and agreed between the parties hereto that unless title shall be taken at the said time and place, or unless said time of closing shall be duly extended, then this contract, at the option of said party of the first part [the New York Life Insurance Company], shall become void and the said payment of One hundred thousand (\$100,000) dollars made to it shall be retained by it as liquidated damages. In case any valid defect to the title is found, and the same is rejected therefor by the purchaser, then this contract shall become void and the said sum of One hundred thousand (\$100,000) dollars shall be returned with interest."

The contract provided that the purchaser was to be Roberts or a corporation to be thereafter formed. Such a corporation was formed and on February 3, 1917, Roberts assigned all his interest in the contract to the Garden Tower Corporation, in which one Paris E. Singer was interested. In order to provide for the payment of the \$300,000, Singer purposed to secure a loan upon the collateral security of Singer Sewing Machine Company stock. Owing to the condition of the money market, he experienced difficulty in obtaining the loan upon satisfactory terms. Thereupon, through the influence of certain officers of the defendant, a loan for \$300,000 was arranged with the New York Trust Company, but upon terms that Singer considered unduly onerous. An application was made for an extension of the time of closing title until May first, and later, if that was impossible, until April first. One of the vice-presidents of the defendant, on declining to grant this extension, said that the purchasers would either take title at twelve o'clock noon on March first, "or off go their heads," and "furthermore, when we cut off their heads we will cut it off close up to the shoulders." Between the date of the contract and the date for closing, mechanics' liens were filed against the premises, one on January 25, 1917, for \$1,337.80, and one on February 27, 1917, for \$1,199.29, which were unsatisfied on March first. When the parties met to close title, these outstanding liens were called to the attention of the attorney for the defendant, and it was suggested that a few days' adjourn-

ment be taken to enable the defendant to clear the title. The defendant's attorney said that he had no authority to grant any adjournment, that he could bond those liens in an hour, and insisted on the Garden Tower Corporation then and there taking title. He tendered the deed duly executed and the bond and mortgage prepared for execution, and demanded performance on the part of the corporation. Thereupon the attorney for the corporation refused the tender on the ground that the property was not free and clear of all incumbrances except those specified in the contract, and demanded the return of the \$100,000.

The Garden Tower Corporation assigned its claim under said contract to plaintiff, and this action was commenced to recover the \$100,000 with interest. The defendant rested upon plaintiff's case, and the court directed a verdict for the defendant. The grounds for this decision were stated to be: (1) That the mechanics' liens were incumbrances which it was in the power of the vendor to remove, and did not operate as a breach of defendant's contract; (2) that there could be no recovery of damages for defendant's alleged breach without an allegation in the complaint and proof on the trial of the vendee's readiness and willingness to perform.

(1) It cannot be controverted that these mechanics' liens were incumbrances which were not provided for in the contract, and furthermore, that the defendant had the ability to remove them, but did not do so. It stood on its right to tender a deed of the property thus incumbered. The attorney for the defendant stated he would give his word that he would bond them. He, however, refused to grant an adjournment for the purpose of allowing the title to be cleared. Time was by its terms made of the essence of the contract unless an adjournment should be granted, and the defendant had, by its insistence on an immediate closing and its repeated refusal of requests for an adjournment, made the very hour of the day essential to its performance. There was not even the suggestion that the purchaser could retain a sufficient sum from the purchase money as a protection against these liens. It is to be borne in mind that there was to be no covenant against incumbrances in the deed. The defendant insisted on the vendee giving up its contract right, for the contract would

be merged in the deed (*Murdock v. Gilchrist*, 52 N. Y. 242, 246; *Schoonmaker v. Hoyt*, 148 id. 425, 429), and accepting the mere oral promise of the attorney that he would bond the liens. In *Higgins v. Eagleton* (155 N. Y. 466), relied upon by the respondent, the objections raised at the time of closing were unfounded, but the trial court held that by reason of the existence of a mortgage upon the adjoining property, which had an easement because the beams rested in the wall of the premises to be conveyed, the vendor was unable to give a valid release. The Court of Appeals held that this objection was not made upon the law day; had it been, the vendor could have procured a proper release; and said (p. 472): "In this contract there was no express stipulation making prompt performance, or performance upon the day named, any part of the substance of the agreement. So that, manifestly, time was not of the essence of the contract."

In the instant case the objection was raised upon the law day, and demand made that the incumbrances be removed, and an offer made to adjourn the closing to permit the defendant to clear the title, all of which it refused to do.

(2) It is a well-settled rule, as stated by the learned trial justice, that the obligations of the parties to an executory contract of purchase and sale are concurrent and dependent, and there can be no recovery of damages for the vendor's alleged breach without an allegation in the complaint and proof upon the trial of the vendee's readiness and willingness to perform. The exception to the rule is equally well settled and is stated in the cases relied upon by the court and by respondent's counsel, that a formal tender and demand by the vendee is unnecessary where the vendor in advance refuses to comply with the terms of the contract, or where he has placed himself in a position where performance is impossible. (*Ziehen v. Smith*, 148 N. Y. 558, 561, and cases cited 562; *Vandegrift v. Cowles Engineering Co.*, 161 id. 435, 443.) In *Morange v. Morris* (3 Keyes, 48), cited with approval in *Hartley v. James* (50 N. Y. 38, 44), the property was incumbered by the lien of certain taxes and assessments. The court said: "By his agreement he was not only to convey a title in fee simple, but he was to convey and assure it free from all encumbrances except as therein specified, and the encumbrances

referred to were not within the exception. The existence of the encumbrances, at the time fixed in the agreement for the execution and delivery of a deed, was a breach of the agreement on his part, which put it out of his power to perform, and excused the plaintiff from tendering payment. * * * The act of conveying the premises free from all encumbrances, was to be concurrent with that of the payment of the purchase money. The plaintiff was under no obligation to pay his money to the vendor, and trust to a remedy by action for damages in case the vendor failed to remove the encumbrances." The general language of this case has been somewhat limited and the case has been distinguished from others, but there is nothing either in the limitation or distinction that impairs the application of the principle on which the case was decided to the instant case, in which the vendor refused to remove the incumbrances and insisted on tendering a deed of the property incumbered, which if accepted with knowledge of the liens would leave the vendee no right to damages because the deed did not contain a warranty against incumbrances. The instant action was not brought to recover damages for the breach of the contract, but to recover back a payment made on account of the purchase price, on the ground that, as the vendor was not ready at the time appointed to convey a title to the premises free from incumbrances, and refused on demand to clear the title, the vendee had exercised his right to rescind and reclaim what he had paid. (*Bigler v. Morgan*, 77 N. Y. 312, 318.) There is no allegation of damage by way of legal expenses incurred. All that is demanded in the complaint is the \$100,000, paid on account of the purchase price at the time the contract was signed.

The judgment and order should be reversed, with costs, and judgment ordered for the plaintiff for \$100,000, with interest from the 2d day of January, 1917, with costs.

CLARKE, P. J., LAUGHLIN and SMITH, JJ., concur; MERRELL, J., dissents.

[MERRELL, J. (dissenting):

This appeal is by the plaintiff, Mary F. Roberts, from a judgment in favor of the defendant, New York Life Insurance Company, entered upon the verdict in favor of said defendant

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directed by the court at Trial Term. The plaintiff also appeals from the order denying her motion to set aside the verdict and for a new trial.

The action is brought to recover the sum of \$100,000 and interest, which sum was paid by the plaintiff's assignor upon the contract of sale upon its execution on January 2, 1917. The contract was between the defendant and one William C. Roberts, and by the terms of the contract in consideration of the sum of \$2,400,000 to be fully paid as in the contract provided, the said defendant agreed to sell and convey to the said William C. Roberts, plaintiff's predecessor, the Madison Square Garden property. Under the terms of the contract the said sum of \$100,000 was to be paid upon the execution thereof, the sum of \$300,000 was to be paid thereafter and on the 1st day of March, 1917, which was the time the defendant was to execute, acknowledge and deliver to the grantee a proper deed with covenants against the grantor's acts for the conveying to said Roberts or his assigns the fee simple of said premises free of incumbrances, except taxes, assessments and water rates payable after the date of the contract, and subject also to certain bookings and leases then outstanding against the property. The final payment of \$300,000 was to be made and the deed delivered at the office of George W. Hubbell at 346 Broadway, New York city, and it was further agreed that upon the payment of said \$300,000 on March 1, 1917, the grantee should execute and deliver to the defendant a purchase-money bond and mortgage upon the property to secure the balance of the purchase price of \$2,000,000. The contract also contained the following provision: "In case any valid defect to the title is found, and the same is rejected therefor by the purchaser, then this contract shall become void, and the said sum of One hundred thousand (\$100,000) dollars shall be returned with interest."

Subsequent to the execution of the said contract it was first assigned with all rights of the grantee thereunder by said William C. Roberts to the Garden Tower Corporation, and thereafter the said contract, together with all rights accruing to the grantee and his assignee thereunder was duly assigned and transferred by the Garden Tower Corporation to the plaintiff, Mary F. Roberts.

It is the claim of the plaintiff that upon the 1st day of March, 1917, the date upon which the contract was to be performed by the payment of the \$300,000 by the grantee, the execution and delivery of the deed of the property by the defendant to the said grantee and his execution and delivery of the purchase-money bond and mortgage to the grantor to secure the balance of the purchase money of \$2,000,000, the grantor was unable to furnish the grantee with a valid title to said property and that by reason thereof the grantee rejected the title and deed then and there tendered by the grantor. It is the claim of the grantee and the plaintiff herein that there were outstanding upon said property upon the law day when the parties met to fulfill said contract, two mechanics' liens, both of which were filed subsequently to the execution of said contract. These liens aggregated in amount a little more than \$2,500, and had been filed by contractors who had furnished lumber and materials to one Grundy holding a lease of a part of said premises and which was used in the erection of a skating rink therein for said tenant. It was claimed by the representatives of the assignee of the grantee under said contract at the time and place where said contract was to be performed, that said liens constituted a valid defect in the title of the New York Life Insurance Company, and that by reason thereof the title offered by the said company was rejected by the representatives of the grantee.

The court at the close of the plaintiff's case upon the trial directed the jury to return a verdict in favor of the defendant. A motion was made to set aside the verdict of the jury and for a new trial, which was denied by the court. No tender of performance was made by the grantee upon the rejection of title, nor did the grantee demand that the insurance company perform the contract on its part by delivering a deed of the property conveying title thereto free of incumbrances.

It appears from the opinion of the trial court that the jury was directed to find for the defendant upon the ground that the plaintiff had failed to show a tender of performance on the part of the grantee, and a demand of the grantor that it perform said contract on its part, which the court held was a condition precedent to bringing suit to recover back the

assignee's money paid at the time of the execution of the contract.

I think the reasons stated by the trial court for directing a verdict in defendant's favor are sound, and that under the authorities it was necessary for the plaintiff, before bringing suit, to prove a tender of performance on the part of the grantee and a demand that the grantor deliver the deed provided for by the contract.

Under the precise terms of this contract I do not think that the existence of the two mechanics' liens upon the property covered by the contract upon the law day thereof was a "valid defect to the title." The provision of the contract with reference to the recovery of the assignee's money is that "In case any valid defect to the title is found, and the same is rejected therefor by the purchaser, then this contract shall become void, and the said sum of One hundred thousand (\$100,000) dollars shall be returned with interest."

The law seems reasonably well settled that the existence of a mechanic's lien upon property does not create a defect in the title thereto. (*Raben v. Risnikoff*, 95 App. Div. 68; *March v. Marasco*, 165 id. 348.)

Raben v. Risnikoff (*supra*) arose in the Second Department and was to recover, as in the case at bar, moneys paid to the vendor upon the execution of the contract. Mr. Justice WILLARD BARTLETT, in delivering the unanimous opinion of the court in that case, among other things, said: "It appeared that there was a mortgage of \$600 upon the land, payable on demand, which was not mentioned in the contract. If the vendor had then paid this mortgage, or tendered to the vendee an amount sufficient for its payment, he might have obviated the objection. He did neither, however. The mere existence on the day when the title is to be closed of an incumbrance on the property to be conveyed, *which it is within the power of the vendor to remove*, does not constitute a breach of the contract (*Higgins v. Eagleton*, 155 N. Y. 466), but if the vendee *then make a tender and demand of performance*, and the vendor fails to remove the incumbrance or provide for its removal to the satisfaction of the vendee, the latter may maintain an action to recover the money paid on the agreement." (Italics are the writer's.)

The evidence in the case at bar shows that no tender of performance was made on the part of the grantee, nor did the grantee demand performance on the part of the insurance company. Indeed, it appears that upon the law day, March 1, 1917, after the attorney for the assignee of the grantee under the contract had made repeated requests for an adjournment in order to secure the necessary moneys to make up the \$300,000 then payable, all of which efforts were attended by failure, as a last resort the attorney spoke of the two mechanics' liens resting against the property. It appears that the insurance company and its attorney were surprised at the information of the existence of such liens, and the attorney then stated that under the provisions of law the liens would be eliminated without delay, and the attorney for the insurance company gave his word that he would see that the property was relieved of said liens at once if the grantee would accept title to the property and perform on his part. This the grantee refused to do, insisting on a further adjournment.

The Lien Law provides for discharging mechanics' liens in several ways. (See § 19, as amd. by Laws of 1916, chap. 507;* Id. § 20.) They may be discharged by payment to the lienor of the amount of his lien and discharge of the same, or may be discharged by executing a bond with proper sureties and in an amount approved by the court. Before action is brought upon the liens they may be discharged by payment into court of the amount of the lien with interest. Thus it would seem that it was within the power of the insurance company on the *law day* itself to have gotten rid of these liens and relieved the property of incumbrances by reason thereof. But even assuming that the existence of the liens constituted a "valid defect" to the title of the property, it is entirely clear from the evidence that the title was not rejected by reason of such defect. The claim that the property was incumbered by liens made by counsel for the grantee after repeated failures to secure a continuance in order that the grantee might raise the money to make payment of the \$300,000 was, I think, a mere subterfuge to enable the grantee to avoid performance of the contract. I do not think there was any

* Since amd. by Laws of 1920, chap. 373.—[RSP.]

rejection of the title of the property in good faith. As pointed out by the trial justice, there were too many ways in which these two small liens, aggregating a little more than \$2,500, in this stupendous deal involving \$2,400,000, could have been discharged, and whereby the purchaser might have been amply protected. Not only could the liens have been discharged as suggested and promised by the solicitor for the insurance company, but the amount thereof could easily have been withheld by the grantee from the purchase price or *pro tanto* the purchase-money mortgage might have been reduced in amount.

But even assuming that the liens constituted an invalidity of title, and that the grantee rejected the same by reason thereof, under the authorities I do not think the grantee could recover the \$100,000 paid upon the execution of the contract, except upon tender of performance on the part of the grantee and a demand of the grantor of performance of the contract on its part. (*McCammon v. Kaiser*, 218 N. Y. 46; *Ziehen v. Smith*, 148 id. 558; *Higgins v. Eagleton*, 155 id. 466.)

Judge O'BRIEN said, in *Ziehen v. Smith* (*supra*): "The contract is not broken by the mere fact of the existence on the day of performance of some lien or incumbrance which it is in the power of the vendor to remove." And, further: "It is not alleged or claimed that the plaintiff on that day, or at any other time, offered to perform on his part or demanded performance on the part of the defendant, * * *. It is, no doubt, the general rule that in order to entitle a party to recover damages for the breach of an executory contract of this character he must show performance or tender of performance on his part."

Had the assignee of the grantee in the case at bar tendered to the insurance company upon the law day performance on the part of said grantee of said contract, tendering the \$300,000 then due upon said purchase price, and had said assignee then demanded the deed from the insurance company in accordance with the terms of the contract, then the insurance company would have been required to act, and on failure to furnish such deed of the property free from incumbrances an action would lie on the part of said assignee to recover the earnest money paid upon the execution of the contract.

I think there can be no question but that the incumbrance,

such as it was, upon the property, was one which the insurance company had it within its power to remove at once. Several different courses to effect such removal were open to it, the adoption of either of which would have enabled it to have performed the contract. The payment of the \$300,000 and the transfer of title and the execution and delivery of the purchase-money mortgage were all concurrent acts, each dependent upon the other. In the absence of tender of performance on the part of the assignee of the grantee and a demand of performance on the part of the grantor, I think no foundation lies either for recovery of damages for failure to perform or to recover back the part of the purchase price paid upon the execution of the contract, and which by the terms of the contract it was agreed should be regarded as liquidated damages, if the grantee failed to perform.

I think the trial court properly directed a verdict herein in favor of the defendant, and that the judgment entered thereon should be affirmed, with costs.

Judgment and order reversed, with costs, and judgment ordered for plaintiff for \$100,000, with interest from January 2, 1917, with costs. Settle order on notice.

NORA CULHANE, as Administratrix, etc., of WILLIAM F. CULHANE, Deceased, Appellant, v. ECONOMICAL GARAGE, INC., Respondent, Impleaded with FRANCIS R. MAYER and MICHAEL F. DAY, Defendants.

First Department, February 4, 1921.

Workmen's Compensation Law—complaint in action for wrongful death of servant stating cause of action for injury arising out of and in course of employment—failure to allege non-compliance with Workmen's Compensation Law—demurrer sustained—election of plaintiff to proceed under Workmen's Compensation Law matter of defense—Workmen's Compensation Law constitutional—plaintiff permitted to amend complaint.

A complaint in an action for the death of an employee which shows that the injury arose out of and in the course of the decedent's employment, within the meaning of the Workmen's Compensation Law, but which does

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not allege that the defendant failed to comply with said law, is demurrable on the ground that it does not state a cause of action.

The fact that the plaintiff sought a remedy under the Workmen's Compensation Law before instituting the present action is a matter of defense that is not presented by a demurrer to the complaint.

The Workmen's Compensation Law is constitutional, and, furthermore, there can be no question of the power of the Legislature to take away the statutory remedy for a death claim and substitute therefor another remedy. The plaintiff, however, should be afforded an opportunity to amend the complaint, if possible, so as to state a cause of action not arising out of and in the course of the decedent's employment or by alleging that the defendant failed to comply with the Workmen's Compensation Law.

APPEAL by the plaintiff, Nora Culhane, as administratrix, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of April, 1920, sustaining defendant's demurrer to the complaint, and also from the judgment entered thereon on the 26th day of April, 1920, dismissing the complaint.

The issue herein was brought on and tried as a contested motion under section 976 of the Code of Civil Procedure.

William Phlippeau of counsel [*Simpson & Simpson*, attorneys], for the appellant.

Walter L. Glenney of counsel [*Bertrand L. Pettigrew*, attorney], for the respondent.

LAUGHLIN, J.:

This is a statutory action (Code Civ. Proc. § 1902 *et seq.*) to recover for the death of plaintiff's intestate who was employed by the defendant company to wash cars in its garage in the borough of Manhattan, New York. It is alleged that the defendant Mayer had a contract with the defendant company for the storage of his automobile at the garage; that one Rhine was the superintendent or manager of the garage and the company also employed defendant Day as foreman; that both Rhine and Day were acting with and had superintendence over the decedent; that on the 18th day of October, 1918, a loaded Colt's automatic pistol was negligently left concealed by the defendant Mayer or his chauffeur in his car at the garage; that he owned it, but had no permit or license to have it; that on said day

the defendant Mayer telephoned said Rhine to take the pistol from his car and unload it and keep it until he or his representative called for it; that Rhine thereupon ordered the defendant Day to obtain the pistol and to unload it in his presence and that Day attempted so to do, but negligently and unlawfully and with reckless disregard for the safety of the decedent and others lawfully on the premises and in the garage failed to remove all of the loaded cartridges and negligently failed to safeguard the pistol and to put it away in a proper place of safety; that on said day decedent while in the garage in the performance of his duties was ordered and commanded by Day, who was his foreman, acting with and having superintendence over him, to come into the office of the garage and the decedent obeyed the command and upon his arriving in the office, Day, within the scope of his employment and authority, commanded the decedent to take the pistol and to deliver it to the defendant Mayer or to his representative when called for, and while in the act of so ordering and commanding the decedent in regard to the return of the pistol and while the pistol was in defendant Day's hand, and by reason of his negligent and unlawful conduct in handling and caring for it, without warning to the decedent, a bullet was discharged from the chamber of the pistol into his body causing his death.

The theory upon which the demurrer was interposed is that the complaint states a cause of action arising out of and in the course of the employment of the decedent in a hazardous employment enumerated in group 41 of section 2 of the Workmen's Compensation Law (as amd. by Laws of 1916, chap. 622, and Laws of 1917, chap. 705) for which a remedy is afforded by that law. In such case it is well settled that no action can be maintained unless it is alleged that the employer failed to comply with the statute with respect to insurance and that where the statute gives a remedy it is exclusive provided the employer has complied therewith. (*Nulle v. Hardman, Peck & Co.*, 185 App. Div. 351; *Matter of Moore v. Lehigh Valley R. R. Co.*, 169 id. 177; *Pierson v. Interborough Rapid Transit Co.*, 184 id. 678; *Matter of Heitz v. Ruppert*, 218 N. Y. 148; *Matter of Daly v. Bates & Roberts*, 224 id. 126.) There is no allegation in the complaint that the garage company failed to comply

with the Workmen's Compensation Law. The complaint, therefore, fails to state a cause of action.

Counsel for appellant states, and respondent concedes, that a claim was made under the Workmen's Compensation Law and allowed, but that the decision of the Commission was reversed and the claim dismissed by the Appellate Division, and *Culhane v. Economical Garage Co.* (188 App. Div. 1) is cited as showing the facts. It therein appears that the evidence before the Commission showed that neither Day nor the decedent was at the time the pistol was discharged acting within the scope of his employment. The opinion of the Appellate Division shows that the foreman called the decedent into the office, not to take and deliver the revolver to the owner as here alleged, but to look at it as a matter of curiosity, and for that purpose took it from a drawer in which it had been placed to hold it for the owner, and that as Day was about to hand it to the decedent to examine it, it was discharged. Counsel for the plaintiff says that his client is being driven from pillar to post without finding any remedy anywhere; but the difficulty is not with the law but with the theory of the claimant and the proof offered before the Commission or with the allegations here made, which are diametrically opposed thereto. Before the Commission it was shown that the accident which resulted in the decedent's death did not arise out of and in the course of his employment, while here it is alleged that it did. If the facts are as alleged in the complaint it is quite clear that there was a remedy under the Workmen's Compensation Law. If through inadvertence or excusable neglect plaintiff failed to show the material facts in presenting her claim to the Commission, doubtless the Appellate Division would, on a proper application, reconsider the dismissal of her claim and remit it to the Commission unless the Commission itself is authorized to reopen the hearing, as to which it is unnecessary for us to decide. We can only decide that on the facts here alleged plaintiff had a remedy under the statute which is exclusive, unless the garage company failed to comply with the statute, which is not alleged.

Counsel for respondent contends that this action is barred by plaintiff's election to seek a remedy under the statute,

but that would be a matter of defense and is not presented by the demurrer; and moreover if plaintiff had an election that could only be for defendant's failure to comply with the statute, and that does not appear. (*Pavia v. Petroleum Iron Works Co.*, 178 App. Div. 345; *Crinieri v. Gross*, 184 id. 817.)

Counsel for the appellant further contends that the Workmen's Compensation Law is unconstitutional; but it has been sustained as constitutional (*New York Central R. R. Co. v. White*, 243 U. S. 188; *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514; *Matter of Walker v. Clyde Steamship Co.*, Id. 529), and this being a death claim for which there was no cause of action at common law, there can be no question with respect to the authority of the Legislature to take away the statutory remedy theretofore given and afford another or to withdraw the remedy altogether provided the statute operates alike on all similarly situated. (See *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469; *Shinnick v. Clover Farms Co.*, 169 App. Div. 236.) Plaintiff, however, in the circumstances, should be afforded an opportunity to amend the complaint, if advised that the facts warrant the amendment, so as to state a cause of action not arising out of and in the course of decedent's employment or by alleging that the garage company failed to comply with the Workmen's Compensation Law, if that be the fact.

It follows that the order should be modified by providing that it is made without prejudice to a motion by the plaintiff to vacate the order and judgment and serve an amended complaint, if she shall be so advised, and as thus modified affirmed, with costs.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Order modified as directed in opinion and as so modified, affirmed, with costs to respondent.

DELLA M. DRAKE, Respondent, v. NATIONAL MOTOR CAR AND VEHICLE CORPORATION, Appellant.

First Department, February 4, 1921.

Motor vehicles — action against manufacturer for injuries alleged to have been caused by defective construction — bill of particulars as to specific defects to be relied on — particulars as to experience of plaintiff in driving and exact time of accident — particulars as to place of accident, speed of car and method of driving.

In an action by the owner of an automobile against the manufacturer to recover for injuries received by the plaintiff in an accident caused by the breaking of a part of the steering gear, the court should be liberal in granting to the defendant a bill of particulars as to the defects in construction or material which the plaintiff will rely on to establish and unsal-

The defendant is entitled to a bill of particulars thereof, was not containing general allegations of negligence, but to the defects in the construction of the entire automobile and of its parts and the testing thereof were intended to be limited by more specific allegations in a later paragraph confining the negligence to the steering apparatus, and if they were not intended to be limited to particularize with respect to them.

The defendant is entitled, also, to particulars as to the parts of the steering apparatus alleged to be worn and of insufficient size and as to the parts alleged to have been omitted in the construction.

The defendant is entitled to particulars as to the experience of the plaintiff in driving the automobile or the exact time of the accident since those questions can have no bearing on the issues.

But the defendant is entitled to particulars as to the exact place where the accident happened, the speed of the car at the time of the accident, and whether the plaintiff put on the foot brake or the emergency brake and whether she claimed either of them was defective.

APPEAL by the defendant, National Motor Car and Vehicle Corporation, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of November, 1920, in so far as the same denies the defendant's motion for a bill of particulars with respect to matters specified in five subdivisions of the notice of motion.

Richard F. Weeks of counsel [*Baldwin & Curtis*, attorneys], for the appellant.

Frank Sowers of counsel [*Richards & Affeld*, attorneys], for the respondent.

LAUGHLIN, J.:

This is an action against a manufacturer of an automobile to recover for personal injuries alleged to have been sustained by the plaintiff, who purchased the automobile from a dealer to whom the defendant sold it, while operating the automobile at some point in the State of Indiana on the 29th day of August, 1918, alleged to have been caused by negligence in the manufacture thereof and in failing to make proper tests of certain of its parts and for damages to the automobile. The liability of the defendant is predicated on *MacPherson v. Buick Motor Corp.* (217 N. Y. 382) and kindred authorities. (219 N. Y. 469; *Donovan v. Two-Passenger National Roadster*, 236.) Plaintiff alleges that in the fall of 1918 defendant sold and delivered the automobile to Combs Motor Company, a dealer in automobiles in Washington, D. C., from whom she purchased it on or about the 10th of April, 1918. In paragraph 4 she alleges that defendant was careless and negligent in the manufacture of the automobile and failed to use due care in its construction and in testing the materials with which it was made as well as by the materials and parts used in its construction and parts in connection with the steering apparatus to be used, the parts were of inferior and unsuitable quality which plaintiff could not stand the strain of the ordinary use to which the automobile was intended to be and was put; and in paragraph 5 that the defendant negligently and without proper care placed on the automobile steering apparatus which was improperly constructed and defective, "in that the parts connecting one of the steering arms of said automobile were worn and of insufficient size, and defendant was negligent, in that a spring, which was a necessary part of said steering apparatus and steering arm, was not placed therein, making such steering apparatus unsuitable and unsafe, liable to become useless

and to break, and said defect was not visible to open or casual inspection by the plaintiff." It is also alleged that during the month of August, 1918, plaintiff delivered the automobile to the defendant "for the purpose of complete overhauling, repair and examination" and that the defendant undertook for a valuable consideration to completely overhaul and repair it and place it in first-class condition and thereafter and during the same month the defendant delivered it to the plaintiff, "alleging and warranting that the said machine had been carefully overhauled and repaired and was in first-class condition, and that in particular the steering apparatus, including steering arm and steering knuckle, and parts connecting with the steering arm and wheel, were in first-class condition, whereas in truth and in fact the defendant negligently failed to discover the defects heretofore recited in said steering apparatus and failed to discover that a portion of said steering apparatus had become worn and unsafe, and that the spring, a necessary part thereof, was not contained therein, and that said steering apparatus was in a dangerous condition." It is further alleged that while the plaintiff was engaged in driving the automobile in the State of Indiana and proceeding therewith in a careful and proper manner, by reason of the defects and the negligence of the defendant thereinbefore recited, "the said steering apparatus became broken, disjointed and useless, and the plaintiff was unable to control the movements of said automobile, and without any negligence of the plaintiff in anywise thereto contributing the said automobile was violently precipitated against an embankment at the side of the road, violently throwing the plaintiff from said automobile to the ground," causing the injuries for which she seeks to recover. The affidavit of the chairman of the board of directors of the defendant shows that it is necessary for the defendant to have a verified bill of particulars as specified in the notice of motion, in order that the issues may be limited and that the defendant may know in advance of the trial the issues it will be called upon to meet and to enable it properly to prepare for trial and to avoid surprise. The order granted the motion for the particulars specified in subdivisions V, VII and VIII of the notice of motion and in all other respects denied it.

It is manifest that in the enforcement of such a remedy against the manufacturer for an accident occurring long after it has parted with the automobile, the court should be quite liberal in granting bills of particulars and that this may be done without prejudice to the plaintiff, for one who attributes such an accident to a defect in the manufacture of the automobile or in the materials of which it was manufactured must be in a position through an inspection of an automobile by experts after the accident to point out precisely the defective construction or the defect in the materials. It will be observed that the 4th paragraph of the complaint contains very general allegations charging negligence with respect to the manufacture of the entire automobile and all of its parts and the testing thereof and that the allegations of the 5th paragraph are confined to negligence with respect to the steering apparatus. The purpose of the demand in the 1st paragraph of the notice of motion is to ascertain whether the general allegations in the 4th paragraph are intended to be limited by the more specific allegations in the 5th. The object of the demand in the 2d paragraph is to have the plaintiff particularize with respect to the allegations of the 4th paragraph if they are not intended to be limited by the 5th. The object of the demands of the 3d is to have the plaintiff name the parts connecting one of the steering arms which it is alleged in the 5th paragraph were worn and of insufficient size; and the object of the demand in the 4th paragraph is to have the name of the spring which it is claimed was a necessary part of the steering apparatus and arm and not placed therein specified. We are of opinion that the defendant is entitled to a bill of particulars with respect to these matters as demanded. The demands of paragraph 6 are too broad in many respects. Neither plaintiff's experience in driving automobiles nor the exact hour of the accident can have any bearing on the issues concerning the negligence with which the defendant is charged; but the defendant is entitled to know where the accident occurred by having the highway named and the vicinity given and to know the speed at which the automobile was traveling and whether plaintiff put on the foot brake or the emergency brake and whether she claims that either of them was out of order.

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The order in so far as it is appealed from should, therefore, be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, to the extent herein specified.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ., concur.

Order so far as appealed from reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, to the extent specified in opinion.

ANNIE DUBOFF, Respondent, v. JOHN J. HASLAN, Individually and as Assistant Property Clerk of the Police Department of the City of New York, and Others, Defendants, Impleaded with G. HINMAN BARRETT, Individually and as Property Clerk of the Police Department of the City of New York, Appellant.

First Department, February 4, 1921.

Replevin — action against property clerk of police department of city of New York to recover property seized by police — Greater New York charter, sections 331-336, and Code of Criminal Procedure, sections 685-690, not bar to action — liability of property clerk for refusal to deliver property — complaint examined and held to state cause of action.

Property seized by the police of New York city at the time an arrest was made on the ground that it was stolen property and delivered to the property clerk of the police department, and not held or required as evidence, may be recovered in an action of replevin by the assignee of the person arrested after the conviction of said person on a charge not involving the property seized, and the plaintiff is not limited to the procedure defined by sections 331-336 of the Greater New York charter and sections 685-691 of the Code of Criminal Procedure to regain possession of the property.

But it would require clear evidence of improper action on the part of the property clerk amounting to bad faith or improper motives to render him liable for not delivering such property to one claiming to be the owner and entitled to the possession and not presenting satisfactory proof thereof, and for requiring an order of a magistrate as required by said statutory

provisions or a writ of replevin or other process of court or an adjudication of title in the claimant if his title be controverted, before surrendering the property thus coming to his possession.

The complaint in an action against the property clerk of the New York city police department to recover property seized by the police and delivered to the defendant's predecessor and by him delivered to the defendant examined, and held, to state facts sufficient to constitute a cause of action.

APPEAL by the defendant, G. Hinman Barrett, individually and as property clerk, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of July, 1920, granting plaintiff's motion for judgment on the pleadings consisting of the complaint and a demurrer thereto for insufficiency and denying his counter-motion for judgment on the pleadings.

Edwin H. Updike, for the appellant.

H. Lionel Kringel of counsel [*Charles G. F. Wahle* with him on the brief; *Wahle & Kringel*, attorneys], for the respondent.

LAUGHLIN, J.:

This is an action on an assigned claim of the plaintiff's husband to recover certain specified items of jewelry, alleged to have been owned by him and to have been seized and taken from his place of business as a dealer in jewelry at 156 Chrystie street in the borough of Manhattan, New York, by members of the police force of the city of New York as such officials on the 6th day of April, 1916, and on or about said date delivered by them into the possession, care and custody of the defendants Haslan as assistant property clerk and Barrett as property clerk of the police department, who it is alleged received and retained the property in their possession and custody in their said respective official capacities and subsequently delivered it over to their successors in office. It is further alleged that entries were made as required by law in the books of the property clerk of the police department, identifying and describing the property, and that it was therein identified and described on voucher or schedule No. 6677 as "being and constituting Items Nos. 1, 2, 4, 5, 6, 7, 8, 10, 13, 31, 32 and 35," and remained so identified and described

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thereafter until and including the 11th of January, 1918; that the seizure and removal of said property from the possession of the plaintiff's husband was wrongful and unlawful, and the property was received by the defendants Haslan and Barrett with knowledge and chargeable with knowledge that it had been so wrongfully and unlawfully seized without warrant or authority of law; that on the day the property was so seized the officers who seized it charged plaintiff's husband with the crime of criminally receiving stolen property, and he was indicted and on the 8th of May, 1916, convicted on the charge in the Court of General Sessions and sentenced to a term in State prison, but that none of the articles seized constituted any part of the articles for receiving which he was convicted or of the *corpus delicti* of the crime for which he was indicted and convicted; that after the conviction of plaintiff's husband neither defendant Haslan nor defendant Barrett had any claim to the property as against him or his assigns and on the 11th of May, 1916, for a valuable consideration, he duly assigned, transferred and set over unto the plaintiff all his right, title and interest in and to said property, and thereafter and on or about that date she informed said defendants of said assignment and that she was the owner of the property, and duly demanded of them and each of them as such assistant property clerk and property clerk that they and each of them deliver to her the possession of the property, but that they jointly and severally refused so to do, and that both of them continued to hold the possession, care and custody of the property, and that Haslan in his official capacity continued to hold it until the 11th of January, 1917, and Barrett in his official capacity continued to hold it until the 31st of December, 1917. It is then alleged, inconsistently with the foregoing, that said Barrett duly resigned on the 31st of December, 1916, and ceased to be such property clerk on January 1, 1917, and that Haslan duly resigned and ceased to be assistant property clerk on January 31, 1918. It is further alleged that the defendant Sunderman was assistant property clerk of said department from December 31, 1916, to and including January 11, 1917, and acted as property clerk between January 1 and January 11, 1917, but ceased to act as such on or about the latter date;

that on or about the 1st of January, 1917, defendants Barrett as property clerk and Haslan as assistant property clerk delivered over said property to said Sunderman as acting property clerk, although they at that time knew and were chargeable with knowledge that the property was not lawfully in their possession and custody as such officials, but was the property of the plaintiff and had been and was wrongfully withheld from her by them and each of them, and that Sunderman received the property from them with knowledge and chargeable with knowledge that it belonged to the plaintiff, who had duly demanded the return thereof, and that it had been and was wrongfully withheld from her; that from January 11, 1917, to and including January 18, 1918, defendant Ringer was the duly appointed and acting property clerk of said department and on the latter date resigned; that on January 11, 1917, defendants Haslan and Sunderman as assistant property clerk and acting property clerk delivered said property and the possession, care and custody thereof to defendant Ringer as property clerk with knowledge and chargeable with knowledge that it was not lawfully in their possession, care and custody but was the property of the plaintiff and had been wrongfully withheld from her by them and the defendant Barrett as aforesaid, and that she had duly demanded the return of it to her, and Ringer as property clerk received the property knowing that the plaintiff had made due demand for the return thereof to her and that she claimed to be and was the owner thereof; that from April 6, 1916, until the assignment to the plaintiff, her husband was the only person who was or claimed to be the owner and who demanded the return of the property, and after the assignment plaintiff was the only person who claimed to be the owner and who demanded the return of the property; that the defendants jointly and severally took into their possession and kept in their possession, care and custody as alleged in the complaint, the said property with knowledge and chargeable with knowledge that it had been so wrongfully and unlawfully seized and taken from the possession of her husband, and that plaintiff has duly demanded of them and each of them the return of the property and they and each of them have refused and continue to refuse to deliver the property to her, and that

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with knowledge of the wrongful and unlawful seizure and taking of the property, they "acted together in continuity and in concert, wilfully and wrongfully to deprive" the plaintiff of the property and of the use and benefit thereof, and have deprived her of the possession, use and benefit thereof, and that they have jointly and severally, wrongfully and unlawfully, retained and withheld the property from her and still continue so to do, and that the property is worth the sum of \$7,399. Judgment is demanded against each of the defendants individually and in his official capacity as aforesaid, jointly and severally, adjudging that plaintiff is the owner and entitled to possession of the property, and that it be delivered to her forthwith, and in case possession thereof cannot be given, that she have judgment against the defendants jointly and severally both individually and in their respective official capacities for \$7,399. The sole ground of the demurrer is that the complaint fails to state facts sufficient to constitute a cause of action against the appellant individually and as property clerk.

Section 1689 of the Code of Civil Procedure, which is in article 1 of title 2 of chapter 14, relating to the recovery of chattels, provides that nothing in that title is to be so construed as to prevent the plaintiff from uniting in the same complaint two or more causes of action in any case specified in section 484. Said section 484 permits, among other things, the joinder of two or more causes of action brought to recover "chattels, with or without damages for the taking or detention thereof." (See subd. 7.) Were it not for the official capacity in which the appellant received, held and delivered the property to his successor in office, it is quite clear that the allegations of the complaint would be sufficient to show a cause of action against him for the conversion of the property, but the action is not in conversion and is only for the recovery of the possession of the property or its value, and the recovery of its value is only demanded as alternate relief in the event that possession of the whole or any part of the property cannot be had. Any cause of action plaintiff may have had for conversion is, therefore, waived. If it appeared that the possession of the property had been taken from the appellant by due process of law, an action for the recovery of the possession thereof

could not be maintained against him, but where, as here, it is alleged that with knowledge of the plaintiff's right to the possession of the property, he refused her demand for possession and wrongfully retained possession and delivered possession to his successor in office, unless protected by his office, he would still remain liable in an action to recover possession of the property, notwithstanding the fact that he has parted with possession; and that evidently is the theory on which the allegations with respect to his knowledge of plaintiff's rights, and wrongful refusal to recognize them and wrongful delivery of the property to another were inserted in the complaint, and not to afford the basis of an action for conversion. (*Vogel v. Badcock*, 1 Abb. Pr. 176; *Sinnott v. Feiock*, 165 N. Y. 444; *Barnett v. Selling*, 70 id. 492; *Dunham v. Troy Union R. R. Co.*, 3 Keyes, 543.) The demurrer does not require a decision or the expression of an opinion as to whether causes of action have been improperly united. The complaint shows that all of the defendants, with the exception of Sunderman, have parted with all custody and possession and control of and over the property to their successors in office, and it is to be inferred that the property is still held by the property clerk or assistant property clerk of the police department and that possession thereof can be acquired by the plaintiff if entitled thereto. If is, however, stated in respondent's points that the property has been lost by theft, but that is not shown by the record. The learned counsel for the appellant contends that the presumption of law in favor of the legality of the acts of public officials is not overcome by the allegations of the complaint, and that the property having been seized by police officers and delivered to the property clerk of the police department and no court order having been obtained requiring the delivery of it to the plaintiff, appellant was not only warranted in withholding possession of the property, but it was his duty so to do and to deliver it to his successor when he resigned. The statutory provisions cited in support of the contention are sections 331-333 of the Greater New York charter (Laws of 1901, chap. 466) and sections 685-691 of the Code of Criminal Procedure. Section 331 provides for the appointment by the police commissioner of some person as clerk to take charge of all property

alleged to have been stolen or embezzled and which is brought into the "police office," and all property taken from the person of a prisoner, and all property or money alleged or supposed to have been feloniously obtained, or which shall be lost or abandoned and taken into the custody of any member of the police force in the city of New York, and which shall come into the custody of any criminal court or any magistrate or officer, and provides for the description and registration of such property in a book to be kept by the property clerk, which shall contain "the name of the owner or claimant if ascertained, the place where found, the name of the person from whom taken, with the general circumstances, the date of its receipt, the name of the officer recovering the same, a description thereof, the names of all claimants thereto, and any final disposition of such property or money." The statute further provides that the police commissioner may prescribe regulations in regard to the duties of the property clerk. (See, also, Laws of 1917, chap. 400, amdg. said § 331.) Doubtless, as contended by counsel for the appellant, it was the duty of the property clerk to receive the property in the first instance, but counsel for respondent argues that he had no right to retain it as against the demands of the lawful owner after the trial and conviction of the plaintiff's husband, which so far as may reasonably be inferred from the allegations of the complaint, removed any further necessity for retaining the property as evidence.

Section 332 of the Greater New York charter provides that "Whenever property or money taken from any person arrested shall be alleged to have been feloniously obtained, or to be the proceeds of crime, and brought, with all ascertained claimants thereof, and the person arrested, before some magistrate for adjudication, and the magistrate shall be then and there satisfied from evidence that the person arrested is innocent of the offense alleged, and that the property rightfully belongs to him, then said magistrate may thereupon, in writing, order such property or money to be returned, and the property clerk, if he have it, to deliver such property or money to the accused person himself, and not to any attorney, agent or clerk of said accused person." Section 333 provides that if any claim to the ownership of property or money

brought before a magistrate as provided in section 332 shall be made on oath by or in behalf of any one other than the person arrested, and the accused shall be held for trial or examination, the property or money shall remain in the custody of the property clerk until the discharge or conviction of the person accused "and until lawfully disposed of." Section 334 provides, so far as here material, that all property or money taken on suspicion of having been feloniously obtained, or of being the proceeds of crime, and for which there is no other claimant than the person from whom it was taken, shall be transmitted as soon as practicable to the property clerk to be registered and advertised in the *City Record* for the benefit of all persons interested and for the information of the public "as to the amount and disposition of the property so taken into custody by the police." Section 335 provides that "If the property stolen or embezzled be not claimed by the owner, before the expiration of six months from the conviction of a person for stealing or embezzling it, the officer having it in his custody must, on payment of the necessary expenses incurred in its preservation, deliver the same to the property clerk. The property so delivered to said property clerk, and all such other property, securities, moneys, things or choses in action, that shall remain in the custody of the property clerk for the period of six months without any lawful claimant thereto, after having been advertised in the *City Record* for the period of ten days, may be sold at public auction in a suitable room to be designated for such purpose, and the proceeds of such sale shall be paid into the police pension fund." The section forbids the delivery of property "to the property clerk or at the central office of the police department, except as provided by law." After the action was commenced section 335 was amended so as to insert a proviso with respect to certain property, but the proviso does not embrace such property as that here in question. (See Laws of 1920, chap. 734.) Section 336 provides that if property or money placed in the custody of the property clerk shall be desired as evidence in a police or other criminal court, it shall be delivered to an officer presenting an order of the court therefor, but shall be returned to the property clerk "to be disposed of according to the previous provisions" of that chapter. (See Greater New York

Charter, chap. 8.) Section 685 of the Code of Criminal Procedure provides that where property alleged to have been stolen or embezzled comes into the custody of a peace officer he must hold it subject to the order of the magistrate authorized by section 686 to direct the disposal thereof. Section 686 provides that the magistrate before whom an information is laid or who examines the charge against the person accused of stealing or embezzling the property, may, on satisfactory proof of the title of the owner, order it to be delivered to the owner, unless its temporary retention be deemed necessary in furtherance of justice; and authorizes the magistrate to require the owner to pay the reasonable and necessary expenses incurred in preserving the property, and provides that the order shall entitle the owner to demand and receive the property. Section 687 requires a magistrate into whose custody stolen or embezzled property comes to deliver it to the owner on satisfactory proof of his title and on payment of the necessary expenses incurred in preserving it, unless its temporary retention be deemed necessary in the furtherance of justice. Section 688 provides that if property stolen or embezzled has not been delivered to the owner, the court before which the trial is had for stealing or embezzling it, may on proof of his title order it to be restored to the owner. Section 689 relates to the disposition of the property stolen or embezzled and not claimed by the owner within six months after the conviction of a person for stealing or embezzling it. Section 690 requires a receipt to be given when money or other property is taken from a defendant arrested upon a charge of crime, but it does not apply to the city of New York. Section 691 applies to New York city and is in substance the same as section 331 of the Greater New York charter and requires that a person be designated to take charge of all property alleged to have been stolen or embezzled "and which may be brought into the police office" or is taken from the person of a prisoner.

These statutory provisions were doubtless deemed sufficient to regulate the duties of the property clerk with respect to property coming into his custody. For complying with them and in good faith performing his duties under them, reasonably and intelligently, he should not be and cannot be subjected

to liability. It is his duty to keep the property safely until it is disposed of as provided in the statutory provisions to which reference has been made, or until it is taken from him by a lawful writ or other process or claimed by one whose title or right to possession is uncontroverted, or if disputed, is duly adjudicated. It is manifest that he is not at liberty to surrender the property to any claimant at any or all times, and he should not be held liable in conversion predicated on his failure to deliver it to one claiming to be the owner but whose title is not clear, or is not satisfactorily established, or where it may still be required as evidence, or where there is another claimant; but these statutory provisions do not bar the ordinary remedy afforded to an owner to regain possession of his property, which is not held or temporarily required as evidence. (*Lynch v. St. John*, 8 Daly, 142; *Wagener v. Harriott*, 20 Abb. N. C. 283; *Simpson v. St. John*, 93 N. Y. 363; *Houghton v. Bachman*, 47 Barb. 388; *People ex rel. Simpson Co. v. Kempner*, 154 App. Div. 674.) It is perfectly plain, therefore, that it would require clear evidence of improper action on the part of the property clerk tantamount to bad faith or improper motives to render him liable for not delivering such property to one claiming to be the owner but not known to him to be the owner and entitled to possession and not presenting satisfactory proof thereof, and for requiring the order of a magistrate or court under the statutory provisions to which reference has been made or a writ of replevin or other process of the court or an adjudication of the title in the claimant if his title be controverted, before surrendering possession of the property thus coming to him in his official capacity. I am of opinion, however, that sufficient facts are alleged and admitted by the demurrer to sustain the action to recover the property or to recover its value from appellant, unless he shall be in a position to deliver possession to the plaintiff, on the theory that he parted with possession by wrongfully delivering the property to his successor in office with full knowledge that plaintiff was entitled to have the possession thereof delivered to her, and that he had wrongfully and without right refused her demand therefor. It stands admitted by the demurrer that the plaintiff's husband was the owner; that the property had been wrongfully seized and

taken from his possession and delivered into the possession of appellant, in violation of the provisions of section 335 of the Greater New York charter, hereinbefore quoted; that title thereto passed to the plaintiff under the assignment from her husband, and that she was entitled to the possession thereof when she demanded possession of appellant, and that he well knew that she was so entitled to possession; that his possession thereafter was wrongful and his delivery of possession to his successor was wrongful and in violation of her rights as owner. If the appellant can controvert those allegations, he should answer, joining issue thereon and presenting any defense he may have to the action.

The order should, therefore, be affirmed, with ten dollars costs and disbursements, but with leave to appellant to withdraw the demurrer and answer on payment of the costs of the appeal and motion.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Order affirmed, with ten dollars costs and disbursements, with leave to appellant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term.

JOHN S. KEDROVSKY, Appellant, v. ARCHBISHOP AND CONSISTORY OF THE RUSSIAN ORTHODOX GREEK CATHOLIC CHURCH and Others, Respondents.

First Department, February 4, 1921.

Motions and orders — resettlement of order by striking out erroneous recital that certain papers were read on motion.

The plaintiff is entitled to have an order, denying his motion to have certain moneys held by the chamberlain of the city of New York paid over to him, resettled by striking therefrom recitals that certain papers were read on the motion, where the plaintiff's affidavit that said papers were not read is uncontroverted and the memorandum and opinion of the court is to the same effect, and there is nothing to show that the court had any independent recollection to the contrary.

APPEAL by the plaintiff, John S. Kedrovsky, from an order of the Supreme Court, made at the New York Special Term

and entered in the office of the clerk of the county of New York on the 24th day of March, 1920, denying plaintiff's motion to resettle the order entered herein on the 18th day of March, 1920.

Ralph M. Frink, for the appellant.

Edward J. Martin, for the respondents.

Francis N. Bangs of counsel [*Merrill E. Gates, Jr.*, receiver],
as *amicus curiæ*.

LAUGHLIN, J.:

It appears by affidavit that Francis S. Bangs was duly appointed, by an order made in this action, a receiver of certain property which is the subject-matter of the litigation and that by an order duly made and entered on the 18th day of July, 1919, defendant Nemolovsky, archbishop of the defendant church, was ordered and required to deliver to the receiver certain of the property, described in the order, and the proceeds of the sale of certain of the property sold by the defendants since the 17th day of October, 1918, and that after the service upon said defendant of a certified copy of the order, he failed to comply therewith in that he failed to pay over to the receiver the sum of \$2,041.96, being the proceeds of sales of the property. Thereafter, on the plaintiff's motion, an order was duly made at Special Term and entered on the 26th day of November, 1919, adjudging said defendant in contempt for failing to turn over said sum to the receiver as required by said order and further adjudging that said misconduct of said defendant was calculated to and did defeat, impair, impede and prejudice the rights and remedies of the plaintiff to his loss and damage in said sum and that the funds of the trust estate in the hands of the receiver applicable to the purposes of the trust specified in the complaint and to the expenses of the action and receivership were thereby diminished and lessened to the extent of said sum and said defendant was thereby fined said amount and required to pay the same pursuant to article 19 of the Judiciary Law, and in default thereof it was ordered that he be committed until he complied therewith or should be discharged according to law. The order did not specify

to whom the fine should be paid. It appears by the affidavit of the attorney for the plaintiff that when the parties were before the court with respect to the determination of the amount of the fine to be imposed on said defendant, it was suggested that said defendant claimed to have applied part of the money to the benefit of the trust estate and that, therefore, he might be entitled to a credit on the fine therefor and that the plaintiff's attorney thereupon stated that if said defendant wished to litigate that question he would consent that the fine be deposited in court pending a decision on the point, and accordingly when said defendant was ready to pay the fine he stipulated that an order might be entered permitting the payment of the fine to the chamberlain of the city of New York and that it was stated in the stipulation and in the order entered thereon that the intention of the plaintiff's attorney in so consenting was to afford said defendant a reasonable additional time to make motions as he might be advised with respect to said fine and not to give him any new or additional right or to prejudice any rights of the plaintiff under the original order, and that pursuant to the order as thus modified the money was paid to the chamberlain who gave a receipt therefor which plaintiff holds. An affidavit made by the attorney for the respondents shows that he was of the opinion that the fine should be paid to the receiver, and that the attorneys appeared at Special Term before the justice who made the order modifying the original order by requiring that payment be made to the chamberlain, and that said modified order was drawn by the attorney for the plaintiff after the attorney for the defendants had ascertained from the chamberlain's office that the fine would be placed to the credit of the action, and that the defendants' attorney had consistently contended that the fine was imposed to take the place of the property wrongfully sold and that it should be retained either in court to the credit of the action, as it has been paid, or by the receiver. It appears that the receiver Bangs died and thereafter a motion was made by the plaintiff for an order requiring the chamberlain to pay over the amount of the fine to the plaintiff and that motion was denied and an order denying it was entered on the 18th of March, 1920.

That order recites, among other things, that the order appointing the receiver and the affidavits and motion papers upon which it was made and the order directing said defendant to turn over to the receiver the contents of the church stores or the proceeds of the sale or sales of such part of the stocks of goods therein as had been sold and disposed of by the defendants since October 17, 1918, and the affidavits and motion papers upon which said order was made, were read on the motion for the order requiring the chamberlain to pay over to the plaintiff the amount of the fine so deposited with him. The memorandum decision and opinion of the court denying the motion does not show that any of those papers were before the court and an affidavit made by the attorney for the plaintiff, which is uncontroverted, shows that they were not made part of the motion papers or presented or read by either party or by the court on the hearing and decision of the motion. Plaintiff evidently contemplates appealing from the order and it appears that these papers which were not read on the motion are very voluminous. Without intending to encourage an appeal from the order denying plaintiff's motion to have the money paid over to him, we are of opinion that the plaintiff is entitled to have it resettled by eliminating the erroneous recitals that these papers were read on the motion. Where there is a question of fact with respect to the reading of papers on a motion, arising either on the affidavits or on the affidavits and the recollection of the court, the determination of the court is ordinarily controlling; but here plaintiff's affidavit is uncontroverted and the record of the court by the memorandum and opinion is to the same effect and there is nothing to show that the court had any independent recollection to the contrary.

It follows that the order denying plaintiff's motion to resettle the order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,
concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CLAUS LAFRINZ, Plaintiff, v. PAYNE WHITNEY and Others,
as Executors, etc., of OLIVER H. PAYNE, Deceased,
Defendants.

First Department, February 4, 1921.

Submission of controversy — right of court to draw inferences — wills — construction of bequest to "each person * * * customarily employed as part of my household" as including watchman.

The court is not at liberty to draw inferences from facts stipulated on the submission of a controversy on an agreed statement of facts.

The plaintiff was entitled to take under a bequest in a will by which general legacies were made "to each person * * *, who at the time of my death shall be in my service and shall then be customarily employed as part of my household," where it appeared that the plaintiff at the time of the testator's death was in his service and had been for eighteen years "customarily and continuously employed as a watchman watching the exterior" of testator's town house; that the contract of employment was oral, and that the plaintiff performed his work under the supervision of the testator or the butlers employed by him from time to time, and his compensation was paid monthly by the butler, though it did not appear where he ate or slept.

The plaintiff was customarily employed as part of testator's household, since he performed his duties exclusively in and about the premises and under the supervision of a butler, who customarily supervises the performance of the duties of household servants.

SMITH, J., dissents.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Gustav Goodmann, for the plaintiff.

Edwin De T. Bechtel of counsel [*Sidney Wetmore Davidson* with him on the brief; *Carter, Ledyard & Milburn*, attorneys], for the defendants.

LAUGHLIN, J.

The point presented by this submission relates to the construction of the will of Oliver H. Payne, who died on the 27th of June, 1917, and whose will was duly admitted to

probate by a surrogate of New York county on the 16th of August, 1917. The submission does not show when the will was executed, but it appears that the testator maintained a country house in Ulster county and a town house known as No. 582 Fifth avenue, in the borough of Manhattan, New York. At the time of the death of the testator the plaintiff was, and continuously for more than eighteen years had been in his service "and customarily and continuously employed as a watchman watching the exterior" of the said town house and premises. The contract of employment was verbal and was personally negotiated by the testator and the term of employment commenced on the 2d day of May, 1899. The plaintiff performed his duties under the immediate supervision of the testator and butlers employed from time to time by the testator, and his compensation was paid monthly by the butler. The will contains certain specific and general legacies and the submission shows that after their payment there will remain not less than \$100,000 as the residuary estate. The plaintiff is not named as a specific legatee and he is not referred to by name in the will. He claims a legacy under the paragraph of the will bequeathing general legacies which is as follows:

"To each person, not hereinbefore named, who at the time of my death shall be in my service and shall then be customarily employed as part of my household in my house in New York City or in my country house in Ulster County, New York, the sum of three thousand dollars, if he or she shall have been in my service for two years, with the further sum of two hundred dollars for each year, or portion of year in excess of two years, and the sum of one thousand dollars if he or she shall have been in my service for less than two years."

It is stipulated that the plaintiff is entitled to recover of the executors \$6,400 and interest thereon from the 16th of August, 1918, if he is included in the general provisions of the will herein quoted.

It is evident that the submission could have been made more definite by stating expressly whether the plaintiff received his board from the testator and ate in the house with the domestic servants, and whether he was furnished sleeping accommodations there. It may be that inferences favorable

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to the plaintiff with respect to these matters could be drawn from the facts stipulated, but on a submission the court is not at liberty to draw inferences. The point presented for decision depends upon the intent of the testator (See *Tilden v. Green*, 130 N. Y. 29, 51; *Lewisohn v. Henry*, 179 id. 352, 361); and I am of opinion that the facts stipulated sufficiently show his intent to give a legacy to the plaintiff under these general provisions. It is stipulated, in effect, that the plaintiff was on duty under this employment continuously for upwards of eighteen years and that his duties were to watch the exterior of the house and premises. The submission does not show from what point or points he watched the house or premises; but it is not a strained construction of these provisions of the will intended to reward loyal or faithful services of employees in and about the household of the testator to hold that the plaintiff in the performance of those duties during this long period of years, evidently to the satisfaction of the testator, was deemed by the testator to be customarily employed as part of his household in his town house. It is stipulated that he performed his duties under the supervision of the testator and of the butlers from time to time employed by the testator, and that he was paid monthly by the butler. In these circumstances I think the stipulated facts fairly show that the employment of the plaintiff was in and about the town house of the testator, for it is neither stipulated nor is it to be presumed that the plaintiff performed his duties and ate his meals exclusively on the public street or sidewalk outside of the house and premises, both in summer and in winter and did not enter the house at all in connection with his employment, or that the testator or his butler went outside the premises to give him orders and to supervise his work and to pay him his monthly compensation. From the nature and place of employment the plaintiff must from time to time have been in and about the part of the house used by the household servants. The fact that the performance of his duties was in part supervised by the butler and that he was paid by the butler shows that he was in effect regarded by the testator as a domestic servant and that the compensation paid to him was regarded by the testator as a part of the expense of maintaining the town house. It would, I think,

be unreasonable to hold that the testator intended to reward all of his household servants, some of whom doubtless performed services outside of the town house, and not to reward the plaintiff whose services were exclusively performed at the premises in guarding the property of the testator and himself and his family and other servants. There can be no position of employment embodying greater trust and confidence than this employment of the plaintiff by the testator. It would be strange, indeed, if the testator intended to reward all others in his employ at his town house and to make no provision for the plaintiff who had rendered loyal and efficient services of this particularly intimate and confidential nature involving the utmost fidelity, evidently to the entire satisfaction of the testator for so long a period. Doubtless it may not be said that in any and all circumstances a watchman employed to guard a house and premises and the occupants thereof is part of the household; but if he lived in the house and took his meals there, clearly he would be. (*Woodward v. Murray*, 18 Johns. 400; *Matter of Drax* [*Savile v. Yeatman*], 57 L. T. [Ch. D.] 475; *Pippin v. Jones*, 52 Ala. 161, 165; *Perkins v. Morgan*, 36 Col. 360.) But we are not definitely informed with respect to those facts, which might have removed all possible doubt with respect to the construction of the will. We cannot, however, infer that these were or were not facts. We must construe the will on the facts submitted if they are sufficient to enable us to do so. They are evidently the only facts that either party deems material. Regardless, therefore, of where the plaintiff slept or ate, it is stipulated that he was there continuously. If that did not require him to be there day and night, doubtless his hours of duty would have been stipulated or, at least, it would have been stated that he was a day watchman or a night watchman. I deem it quite clear that the testator intended that he should with the other household servants, with whom the testator in placing him under the supervision of the butler with respect to duties and payment of his salary, classified him, take a legacy under these provisions of the will. Judgment, therefore, should go in favor of the plaintiff unless the phraseology employed by the testator is not susceptible of a construction that will enable the plaintiff to take. I think it is.

One definition given by the Century Dictionary of "house-

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hold" is as follows: "An organized family and whatever pertains to it as a whole; a domestic establishment." It is also stated in the American and English Encyclopædia of Law (Vol. 15 [2d ed.], p. 773): "The general definition of household when used as a qualifying word, is pertaining to or belonging to the house or family." It is to be borne in mind also that the phraseology of the will does not confine the legacies to those who were *in fact* part of the household of the testator, and if it did, it may be that the determining inquiry would be whether the plaintiff was one of his domestic servants (See *Woodward v. Murray*, *supra*; *Matter of Drax* [*Savile v. Yeatman*], *supra*; *Pippin v. Jones*, *supra*; *Perkins v. Morgan*, *supra*), but it extends to all those customarily employed as part of his household in his town house. Since the plaintiff performed his duties exclusively in and about the premises and under the supervision of a butler, who customarily supervises the performance of the duties of household servants, I think the testator regarded the plaintiff as customarily employed as part of his household. The words "in my house" are manifestly not to be construed literally and should be deemed to mean in and about or at the house. (See *Bush Brothers Lumber & Milling Co. v. Eastwood*, 132 S. W. Rep. [Tex.] 389, 392.)

Bequests to servants generally have been held to embrace all in the employ of the testator regardless of whether their services were performed exclusively or in part within the house. (See *Thrupp v. Collett*, 26 Beav. 147; *Armstrong v. Clavering*, 27 id. 226.)

The defendants rely principally upon *Frazer v. Weld* (177 Mass. 513). The court there construed a bequest to each one of the servants of the testator "who at the time of my death shall have been in my employ at my homestead or at the stable connected therewith, a period of four consecutive years, the sum of one thousand dollars each," as using the word "homestead" in a restricted sense and meaning dwelling house and construed the bequest as not including a gardener who performed no services either in or about the house or stable; but in so doing the court stressed the fact that the word "homestead" could not be construed in a broad sense for it was limited by the reference to the stable connected therewith.

It follows that the plaintiff is entitled to judgment according to the submission which provides that no costs are to be allowed.

CLARKE, P. J., PAGE and MERRELL, JJ., concur; SMITH, J., dissents.

Judgment ordered for plaintiff, without costs. Settle order on notice.

NEW YORK INCOME CORPORATION, Respondent, v. FRANK M. WELLS and Others, Defendants, Impleaded with BLAKE-DANIELS Co., INC., Appellant.

NEW YORK INCOME CORPORATION, Respondent, v. FRANK M. WELLS and Others, Defendants, Impleaded with JOHN B. DANIELS, Appellant.

First Department, February 4, 1921.

Equity — complaint stating cause of action for accounting and foreclosure of lien against corporation and directors — allegations stating theory of relief incidental to foreclosure — misjoinder of cause of action against individual director.

The complaint in an action against a corporation and its directors examined, and *held*, to state a cause of action in equity to compel an accounting as to a trust and trust fund arising under a certain agreement alleged in the complaint and to foreclose a lien held by the plaintiff on property pledged to it as security.

Allegations with respect to the continuance of the business and specific performance should not be construed as stating separate independent causes of action, but merely a theory of relief incidental to the foreclosure. There is a misjoinder of causes of action in that a cause of action is alleged against an individual defendant by which it is sought to have it adjudged that the plaintiff is entitled to certain stock of the defendant corporation which was issued to said defendant and to compel the transfer thereof to the plaintiff.

APPEAL in the first action by the defendant, Blake-Daniels Co., Inc., from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of March, 1920, as overrules its demurrer to the complaint and denies its motion for judgment dismissing the complaint.

Appeal in the second action by the defendant, John B. Daniels, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of March, 1920, overruling said defendant's demurrer to the complaint.

Frank S. Moore [*Wells & Moore*, attorneys], for the appellants.

Orville C. Sanborn, for the respondent.

LAUGHLIN, J.:

The orders were made on motions for judgment on the pleadings consisting of the complaint and demurrers. Each of the appellants separately demurred on the same grounds, which are in substance as follows: (1) That the complaint fails to state facts sufficient to constitute a cause of action; (2) that causes of action have been improperly united, in that there is a cause of action against the defendant company and Lawrence E. Blake which does not affect the other parties; and a cause of action against the defendant Wells for a breach of duty to the plaintiff and for fraud, and to require him to surrender to it certain capital stock of the defendant company and demanding an injunction, all of which affect no other parties; and a cause of action by the plaintiff as a stockholder, and another under sections 90 and 91 of the General Corporation Law as a creditor of the defendant company, to compel its directors to account for official action and for the appointment of a receiver; and another cause of action for the foreclosure of an assignment by the defendant company to the plaintiff of the pledge of certain rents and for a deficiency judgment against the individual defendants; and still another cause of action for the specific performance of an agreement between the plaintiff and the defendant company.

The allegations of the complaint are neither plain nor concise in all respects, as required by the provisions of section 481 of the Code of Civil Procedure; but I think they are susceptible of the construction that the plaintiff intended to allege thereby, in effect, as follows: that the plaintiff and defendant companies are domestic corporations, and the individual defendants constitute the board of directors of the latter; that after the defendant company was incorporated and had acquired from the New York Central and Hudson River Rail-

road Company leases of fifteen parcels of land, which constituted its sole assets, it negotiated an agreement with the plaintiff under which plaintiff was to indorse and guarantee four promissory notes to be made by the defendant company to its own order and indorsed by it, and then by the defendant Lawrence E. Blake as an accommodation indorser for the benefit and protection of the plaintiff, and the notes were to be discounted by the Lawyers' Title and Trust Company and the proceeds of the discount, together with \$2,000 cash capital, to be otherwise provided by the defendant company, were to be used in the development of the business of the defendant company in improving the leasehold property, and the money was to remain on deposit with the trust company and to be checked out for said purposes only on the counter-signature of the plaintiff, and the plaintiff was to be further protected by a rental income certificate constituting an assignment of the rentals on the fifteen parcels of land to be executed by the defendant company; that the plaintiff intrusted the making and supervision of the agreement in its behalf to the defendant Wells, who was one of its directors, its secretary and its counsel, and it relied upon him to protect its interests; that the notes were made and discounted according to the agreement, and the income certificate was issued to the plaintiff; that the defendant Wells took advantage of the trust so reposed in him by the plaintiff, and with the intent and purpose of defrauding it and without its consent or the knowledge of its president or other directors, participated in the organization of the defendant company and became its treasurer, and with the defendants Lawrence E. Blake and John B. Daniels became its sole incorporators and stockholders, and represented to his fellow-incorporators that the plaintiff required, as a condition of giving its indorsement and guaranty, that thirty-seven and one-half per cent of the capital stock of the defendant company, consisting of 187½ shares of the par value of \$100 each, be issued in his name for the account of the plaintiff, and that, pursuant to his demand, it was so issued and is now so held by him, and that he has refused after due demand to surrender it to the plaintiff; that said Wells, in violation of his duty to the plaintiff, permitted the notes to be so discounted without requiring the defendant company to raise the additional

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\$2,000 as agreed, and that he advanced \$1,333.32 for the company to its landlord in payment of rent, and was reimbursed therefor from the proceeds of the loan; that said Wells upon his signature as treasurer of the defendant company, and the signature of Lawrence E. Blake as president of the defendant company, fraudulently and improperly withdrew from the proceeds of the discount of the notes on deposit with the trust company \$3,158.32, and paid over to the defendant Lawrence E. Blake \$500, and to the defendant John B. Daniels \$200 thereof, and they fraudulently received the same, and he appropriated the balance to his own use; that said Wells as an officer of the defendant company has hindered and refused to consent to the carrying out of repairs upon certain of the leasehold property, which repairs are necessary to develop the rental value thereof and by the terms and conditions of the lease are required to be made by the lessee; that said Wells has also collected certain rents under the rental income certificate assigning the rentals to the plaintiff, for which he has refused to account to the plaintiff or to the defendant company, and he and the other defendants have in these and other respects failed and refused to perform his and their obligations to the plaintiff and to the defendant company; that when the first of the notes, which was for \$2,500, fell due, the defendant company and the defendant Blake as indorser failed to pay it, and it was duly protested and due notice of protest given to the plaintiff and it was obliged to and did pay the note, and thereupon received the note and is now the holder and owner thereof, and that under the agreement, owing to said default, the other notes thereupon became due and payable; that defendant Wells is using his position and control of the said 187½ shares of the capital stock of the defendant company for the domination of the company for his personal benefit, and as a director and officer of the defendant company has, at all times, managed the same solely in his individual interest and in the interests of his associates with a view to making personal profits therefrom, and has refused to manage the company for its benefit or the benefit of the plaintiff as the owner of the said 187½ shares of stock, or for the benefit of the creditors, and has refused to authorize or make repairs required to be made for the proper develop-

ment of the leasehold property and as required by the terms of the lease, and has refused to pay the just debts of the defendant company, in consequence whereof four judgments, each for \$83.72, have been recovered against the defendant company; that the judgment creditors and other creditors of the defendant company are pressing their claims for payment and threaten to attach and levy upon its property and to place the sheriff in possession thereof, which will result in judgments, executions and seizures and forced sales of the property and the cancellation of the lease by the lessor and the cessation of business by the defendant company; that any action on the part of the creditors of the company will interfere with and obstruct its business and cause it and its creditors, including the plaintiff, great and irreparable injury and loss, and the value of the assignment of the rents to the plaintiff will thereby be destroyed; that only as a going concern can the defendant company meet its obligations or arrange for meeting them and comply with its obligations under the lease and prevent a cancellation of the lease owing to its default thereunder; that a controversy exists between the officers of the defendant company by reason of which it is unable to transact any corporate business, and that unless the court appoints a receiver with power to make the repairs and alterations required to be made by the lease, a default will be suffered thereunder, which will result in the cancellation of the lease, to the irreparable injury and damage of the plaintiff and other creditors of the defendant; that any attempt of the plaintiff to enforce its claims at law as a creditor of the defendant will result in similar action on the part of the other creditors and in wasteful strife and controversy and in a default under the lease, which constitutes the sole property of the defendant company, and that can be avoided only by the intervention of the court and the granting of equitable relief, including the appointment of a receiver and the continuance of business under the direction of the court; that unless a receiver is appointed to handle the property of the defendant company as a trust fund for the payment of the plaintiff and other creditors, its property will be dissipated, wasted and sacrificed, to the great and irreparable injury of the plaintiff and other creditors; that unless the defendant Frank M. Wells is enjoined and

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restrained from transferring the 187½ shares of stock held by him pending the action, he will so transfer them, and that the plaintiff has no adequate remedy at law.

The prayer for relief is, (1) that a receiver of the defendant company be appointed with authority to carry on its business; (2) that the court administer the property of the defendant company and adjudicate the rights and claims of the plaintiff; (3) that creditors be enjoined from instituting or prosecuting actions against the company and that its officers and agents be enjoined from interfering with or disposing of any of its property; (4) that in due time, the property of the company be sold and the proceeds applied in payment of its obligations; (5) that it be adjudged that the plaintiff is the owner of the 187½ shares, and that the defendant Wells be required to transfer and deliver them to it, and that in the meantime he be enjoined from disposing of them or delivering them to any one other than the plaintiff; (6) that the individual defendants be required to account to the defendant company for all of their acts as its officers and directors, and for all moneys improperly received by them from it; (7) that the plaintiff have judgment against the defendant company and Lawrence E. Blake as maker and indorser, respectively, of the first note, together with interest and costs, and for the amount of the other notes with interest; (8) that the defendant company and all persons claiming under it after the filing of the notice of the pendency of this action be barred and foreclosed of all right or equity of redemption in or to the premises and assigned rents, and that their right, title and interest be sold and the proceeds applied in payment of the plaintiff's claim and the costs and expenses of this action, and that the individual defendants may be adjudged to pay any deficiency; (9) that the defendants be adjudged specifically to perform the said agreement between the defendant company and the plaintiff, and be adjudged liable to the plaintiff for any deficiency after the application of any amount realized and applicable to the payment thereof, and for other and further relief.

These allegations sufficiently show a cause of action against each of the appellants. The plaintiff, having been obliged to pay one of the notes, and having become liable for the payment of the others, which thereupon became due and

payable, is at least entitled to foreclose its lien on the property pledged to it as security, and is entitled to have the trust fund restored by compelling those who have participated in dissipating it to return the money to the company. On that theory appellant Daniels may be compelled to restore, at least, the amount he received. The plaintiff does not bring the action as a stockholder; and it is quite clear that on the facts alleged it is not entitled to have the directors of the company account, the same as in a stockholders' action, although, in effect, it has demanded that relief. The allegations must be construed as limiting the accounting to the trust and trust fund created by and arising under the agreement. It is not for us now to decide the precise extent to which the plaintiff may have relief. It is sufficient that the complaint states an equitable cause of action against each of the appellants arising out of and under the agreement, and that all other allegations, with the exception of those relating to the stock, are for relief to which the plaintiff deems itself entitled in connection with the foreclosure of its lien and to enable it to have the sale of the property made to the best advantage. We merely hold that the allegations with respect to the continuance of the business and specific performance should not be construed as stating separate independent causes of action, but merely a theory of relief incidental to the foreclosure.

It is equally plain, I think, that the plaintiff has joined with this equitable cause of action against the defendants another cause of action against the defendant Wells only, which in no manner concerns the other defendants. According to the allegations of the complaint, there was no agreement between the plaintiff and any of the defendants by which the plaintiff was to receive part of the capital stock of the defendant company, or by which any part of its capital stock was to constitute a part of the trust property in the administration of which plaintiff was interested. Plaintiff's representative in the matter, without its knowledge or consent, exacted the issuance of the stock in his name and delivery thereof to him for the account of or in behalf of the plaintiff, and the plaintiff on discovering these facts evidently determined to ratify his acts and claim the stock; but no facts are alleged tending to show a cause of action against any of the other defendants

concerning that transaction. According to the allegations of the complaint, the stock has been issued to the defendant Wells, who holds it for the plaintiff. Manifestly, any issue with respect to the ownership or right to possession of that stock is a controversy between the plaintiff and Wells only, and is in no manner interwoven with the main cause of action, which concerns the defendant company and some or all of the individual defendants. Appellants may be prejudiced by the joinder of these causes of action. Their counsel states, by way of argument to show how appellants may be prejudiced, what is said to have actually transpired in this action since the demurrers were argued at Special Term. He says that a receiver has been appointed and that unless the cause of action for the recovery of the stock is eliminated, the company will be unable to discharge the receivership by paying the amount to which the plaintiff is entitled, which he states it has offered to do and that on the offer being rejected a motion was made for a discharge of the receivership on the defendant company's paying the amount owing to plaintiff and costs, which amounts it was ready, willing and able to pay, but that the plaintiff opposed the motion and insisted upon a continuance of a receivership until the issues with respect to the stock are decided, and that when the points were prepared that motion was still *sub judice* at Special Term. Of course, these facts do not appear in the record; but they well might arise and they illustrate how appellants may be prejudiced if issues arising on plaintiff's claim to the stock, which do not concern them, were to be tried and decided herein.

It follows that the orders in so far as they overrule the demurrers for misjoinder should be reversed, with ten dollars costs and disbursements to each appellant, and the demurrers on that ground sustained, with ten dollars costs, but with leave to plaintiff to amend upon payment of the costs of the appeals and motions.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur. 1

Orders reversed, with ten dollars costs and disbursements to each appellant, and demurrers sustained, with ten dollars costs, with leave to plaintiff to serve an amended complaint upon payment of said costs.

JOHN T. HENDRICKS, Appellant, v. HURIN M. CLEMENTS,
Doing Business under the Trade Name of CLEMENTS & SON,
Respondent.

First Department, February 4, 1921.

Master and servant — action for wrongful discharge — contract of employment contained in letter to plaintiff and written acceptance — parol evidence inadmissible to show that contract was not to become effective as to term of employment till plaintiff had demonstrated his ability — charge permitting jury to find that written instrument did not embrace real contract erroneous.

In an action to recover damages for wrongful discharge in which it appeared that the contract of employment consisted of a clear, positive and unambiguous offer by the defendant to employ the plaintiff for three years at a stated salary and a percentage of profits, and an equally clear and unambiguous letter from the plaintiff to the defendant accepting the offer, it was error for the court to permit the defendant to introduce parol evidence to show that said correspondence was tentative merely and that it was the intention of the parties later, and after the plaintiff had demonstrated his ability, to enter into a three-year contract.

It was likewise error for the court to so charge the jury as to permit it to find that the written instruments on which the plaintiff relied did not embrace the real contract between the parties.

APPEAL by the plaintiff, John T. Hendricks, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 25th day of March, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the 2d day of December, 1919, denying plaintiff's motion for a new trial made upon the minutes.

F. C. Nicodemus, Jr., of counsel [*Lawrence Greer* and *H. Brua Campbell* with him on the brief; *Pierce & Greer*, attorneys], for the appellant.

Hector M. Hitchings, for the respondent.

MERRELL, J.:

This action is brought by the plaintiff to recover damages which he claims to have sustained by reason of his wrongful

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discharge by defendant, his employer. Plaintiff claims under a written contract which he alleges he entered into with the defendant on or about June 16, 1917. At that time the defendant, a resident of Philadelphia, in the State of Pennsylvania, was engaged in the sale of linseed oil, representing a large producer of that commodity. Defendant was also the American representative of the Dutch East India Company, acting as its sole agent for the sale in America of cocoanut oil and other products of said company. Owing to the European war then in progress the output of the Dutch East India Company was largely diverted to the United States, via the Pacific coast ports and the Panama canal. The defendant was desirous of obtaining the services of a representative in the city of New York to take charge of defendant's linseed oil and other business at New York. Defendant, early in the year 1917, entered into negotiations with the plaintiff with a view of securing the latter's services as such New York representative. Plaintiff, at that time, resided at San Francisco, Cal., and occupied a position of responsibility as traffic manager of the Western Pacific Railway Company. At defendant's request and upon his suggestion to the plaintiff that a business arrangement might be made to plaintiff's substantial advantage, plaintiff came east and negotiations followed with respect to plaintiff's entering defendant's service. After some considerable negotiations, on June 8, 1917, the plaintiff, who was then at Philadelphia, Penn., made a written proposition to the defendant in effect offering to act as defendant's representative with reference to the business of the Dutch East India Company in the United States, and that plaintiff would also act as defendant's employee in defendant's other general oil brokerage and commercial business at a compensation of \$15,000 per annum, payable monthly, plus ten per centum of the net profits of the business, payable quarterly. In his proposition the plaintiff specified that the arrangement should be for the period of five years, unless by further agreement between the parties the same might be canceled and either a copartnership formed or a corporation organized to handle and continue defendant's said business, in which partnership or corporation plaintiff would expect to participate. The defendant did not

accept such proposition of the plaintiff, but three days later, on June 11, 1917, made a counter-proposition to the plaintiff, in writing, as follows:

" Mr. J. T. HENDRICKS, " PHILADELPHIA, *June 11th*, 1917.

 " San Francisco, Cal.:

" DEAR SIR.— Referring to our conversation of today, we will be very glad to enter into a business arrangement with you on the following basis:

" We will pay you a salary of \$12,000 per annum, and give you an interest of 10% in the net profits of our business at New York and Philadelphia, payable quarterly each year.

" On the Linseed Oil business in New York, instead of paying you 10% profit, we will pay you 50% of the net profits of the Linseed Oil business in the New York territory. We will also enter into a contract with you making this agreement binding for three years.

" We would like very much to have a reply from you prior to July First, 1917.

 " Yours very truly

 " CLEMENTS & SON,

 " H. M. CLEMENT."

This written proposition was either delivered to the plaintiff personally by the defendant or was mailed to and received by the plaintiff at San Francisco. On June 16, 1917, the plaintiff, in writing, accepted defendant's proposition. Plaintiff's written acceptance was embodied in the following letter, which was received by the defendant:

 " J. T. HENDRICKS,

 " San Francisco.

" Messrs. CLEMENTS & SON,

 " 1040 Widener Building,

 " Philadelphia, Pa.:

 " *June 16*, 1917.

" GENTLEMEN.— Referring to yours of June 11th, by Mr. H. M. Clements, I beg to advise that after reflection I will be glad to accept the proposition which you set forth and you may consider this letter as my acceptance and approval thereof.

 Very truly yours,

 " J. T. HENDRICKS."

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Upon receipt thereof the defendant, on June 23, 1917, wrote the plaintiff expressing great happiness that the latter had decided to join the defendant in business, and expressing in the most sanguine terms defendant's confidence in the possibilities and future success of their enterprises. Defendant, in this letter, stated that he would be very happy if the plaintiff could make arrangements to come east by the fifteenth of August and familiarize himself with the details of the business. Plaintiff soon after in the latter part of July, severed his business connections in the west and, accompanied by his wife, came east to take up his new duties.

Defendant testified that he saw plaintiff at Atlantic City, where the plaintiff had taken his wife to recuperate, the latter part of July, and then told the plaintiff that as he had gone through a good deal with his wife and the weather was very hot, if he did not want to he need not come to New York immediately, but to take a few days' rest. Defendant testified that the plaintiff did not, in fact, report to New York until the sixth or seventh of August, but that his salary dated from August first.

Plaintiff at once took up his duties at the New York office, but the evidence would seem to indicate that under plaintiff's direction defendant's business in the city of New York did not prosper satisfactorily to the defendant. Considerable criticism of the plaintiff was indulged by the defendant, culminating in written communications and telephonic conversations wherein defendant severely took the plaintiff to task for failure to put the business upon a paying basis. Finally, upon December 28, 1917, the defendant wrote plaintiff at length criticising his work and the manner in which he discharged his duties as defendant's New York representative. On February 4, 1918, defendant again wrote plaintiff of his disappointment in the existing conditions. On February 8, 1918, plaintiff replied by letter stating to the defendant that he certainly would be unwilling to continue for any protracted period a relation with the defendant which was not mutually satisfactory, and that he would endeavor as soon as practicable to make other connections and to relieve the defendant from his obligations under their contract. Following plaintiff's entry upon defendant's service under said contract he was paid

a salary of \$1,000 for the months of August, September, October, November and December, 1917, and January, 1918. In his letter to the defendant of February 8, 1918, the plaintiff also called attention to the fact that defendant's Dutch East India business had been a very profitable one and that under the terms of their contract the defendant was bound to account to plaintiff for ten per cent of the profits on that business both in New York and Philadelphia, and stated that two quarterly periods had passed and that thus far the defendant had not accounted. This letter of the plaintiff's seems to have precipitated the break between the parties. Upon its receipt defendant called plaintiff upon the telephone and a conversation, very heated on the part of the defendant, ensued, wherein the defendant became more or less abusive toward the plaintiff. On February 12, 1918, at the suggestion of the defendant, the parties met at the Biltmore Hotel in New York city with a view of reaching an understanding. Defendant testified that he then charged the plaintiff with having made a miserable failure of their business enterprise and, finally, becoming very angry with the plaintiff, ordered him from the room, with which command plaintiff complied. On the day following plaintiff wrote defendant expressing disappointment at the result of the Biltmore interview, and suggesting that inasmuch as defendant had requested the same, plaintiff had assumed that the defendant had determined to carry out his obligations under his letter of June 11, 1917, and expressed a willingness on his, plaintiff's, part to continue in the future as in the past to fulfill all obligations on his part; but as defendant had refused to permit plaintiff to do so it became incumbent upon him to pursue his legal remedies. Soon thereafter the present action was commenced.

Defendant, answering the plaintiff's complaint, admitted the making of an arrangement with plaintiff but which defendant claimed was partly oral and partly written, and that the letter of June 11, 1917, from defendant to plaintiff, and plaintiff's reply thereto June 16, 1917, did not make the complete contract between the parties, but that the contract into which they entered was to be thereafter put into definite form. Defendant in his answer also alleged that plaintiff, in his conduct of defendant's business, was wholly inefficient and

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that plaintiff's service was without value and without results to the defendant. Defendant further alleged in his answer that plaintiff had voluntarily left his employ and had breached and violated his contract with the defendant.

The jury upon the trial rendered a verdict in favor of the defendant, upon which the judgment appealed from was entered.

The plaintiff seeks reversal of the said judgment upon this appeal upon the ground of error committed at the trial. Under objection and exception of plaintiff's counsel, defendant was permitted to give parol evidence tending to show that the letter from defendant to plaintiff of June 11, 1917, and plaintiff's letter to defendant of June 16, 1917, upon which plaintiff bases his action, did not embrace the real contract between the parties. Upon the trial the defendant was permitted to introduce parol evidence to the effect that there was an oral understanding between the parties that the provision of the contract stipulating for a definite three years' term was not to become effective until plaintiff had served a six or seven months' apprenticeship during which he should demonstrate his ability to make a success of the business. In permitting such parol proof to vary the terms of the written contract between the parties, I think the trial court clearly erred. The law is too well settled to require discussion or the citation of authorities that all previous negotiations between the parties to a contract are superseded by and are deemed to be embodied in the written instrument itself when finally executed, and evidence of talk or negotiations between the parties to a valid instrument in writing, either prior to or at the time of its execution, is inadmissible to vary or contradict its terms. The only exceptions to this general rule are where through fraud, want of consideration or otherwise, no contract really can be said to exist. In such case parol evidence may be given which may effect a destruction of the written instrument. The effect of such parol evidence would be to show that no contract, in fact, was made. Parol evidence is also admissible in cases where the written contract is upon its face ambiguous or incomplete. In such case parol evidence is permissible, not to contradict or vary the terms of the written contract, but to explain and clarify the same and to complete the agree-

ment of which the writing is but a part. But before parol evidence may be received with reference to a written contract, it must clearly appear that the contract itself is incomplete and it must further appear that the parol evidence sought to be given is entirely consistent with and not contradictory of the writing. (*Thomas v. Scutt*, 127 N. Y. 133; *Wightman v. New York Life Ins. Co.*, 119 App. Div. 496.)

In the case at bar we have presented a clear, unambiguous and positive offer on the part of the defendant to employ the plaintiff for three years at a salary of \$12,000 per annum, together with an interest of ten per centum in the net profits of defendant's business in New York and Philadelphia, payable quarterly each year, and, further, a one-half interest in the net profits of defendant's linseed oil business in the New York territory. In acceptance of such written offer we have the clear and unambiguous letter from plaintiff to defendant of June 16, 1917, stating that the plaintiff accepted the latter's proposition. While the defendant upon the trial contended that the said correspondence passing between the parties was tentative merely, and that it was the intention of the parties later, and after plaintiff had demonstrated his ability as a salesman, to enter into the three-year contract, the evidence does not disclose that any further attempt was made to amplify the plain and apparently complete written contract expressed through such correspondence. Soon after August 1, 1917, pursuant to defendant's written request, plaintiff entered upon the discharge of his new duties, his salary dating from August 1, 1917. He was thereafter paid his salary of \$1,000 a month and no suggestion was made but that the written communications between the parties fully expressed their contract, until plaintiff made claim to share in the net profits of defendant's business enterprises pursuant thereto. Not only must defendant's letter to plaintiff of June 11, 1917, offering plaintiff employment upon the terms therein specified, which were later accepted by the plaintiff in writing, be deemed to embody all talk and negotiations between the parties prior and at the time of said offer and acceptance, but under the very terms of defendant's said letter reference is made to a conversation occurring that day between the parties, and referring to such conversation the defendant states that "We will be very glad

to enter into a business arrangement with you on the following basis:" Thus, so far as anything to the contrary appears, defendant's letter of June eleventh, upon its face, embraced all prior negotiations between the parties. I am of the opinion that the evidence does not present a case where parol evidence may be admitted to vary and contradict the terms of the plain written contract into which the parties entered, and that, therefore, the trial court erred in allowing the defendant to introduce such evidence. Plaintiff was manifestly prejudiced by the introduction of such testimony.

Under the charge of the court the jury was permitted to find that the written instrument upon which the plaintiff relied did not embrace the real contract between the parties. To the court's instruction in this respect the plaintiff duly excepted, and I think thereby error is also presented requiring a reversal of the judgment herein.

The judgment and order appealed from should be reversed and a new trial granted, with costs to the appellant to abide event.

CLARKE, P. J., LAUGHLIN, SMITH and PAGE, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

JENNIE ALTERMAN, Respondent, v. THE HOME INSURANCE COMPANY OF NEW YORK, Appellant.

First Department, February 4, 1921.

Insurance — fire insurance — policy on building and extension thereto occupied as store and dwelling as covering another building on same lot not so occupied — policy not ambiguous.

A policy of fire insurance on a "brick building and extension thereto, occupied as store and dwelling, situate No. 529 East 11th Street," does not cover another brick building on the same lot standing in the rear of the building bearing the number mentioned where it appears that the other building was not occupied as a store and dwelling.

The fact that on the rear of the lot on which the insured building stood there was situate another building not occupied as a store and dwelling does not create any ambiguity in the policy as to what was intended by the parties in issuing and accepting the policy.

LAUGHLIN and PAGE, JJ., dissent.

APPEAL by the defendant, The Home Insurance Company of New York, from a determination and order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 18th day of October, 1920, affirming a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Fifth District, in favor of the plaintiff.

Robert A. Fosdick, for the appellant.

Jacob I. Berman, for the respondent.

MERRELL, J.:

The issues in the Municipal Court were presented through an agreed statement of facts. Plaintiff brought the action to recover a loss of \$400 conceded to have been sustained by her from destruction of real property by fire. The property in question was owned by the plaintiff and was situated upon plaintiff's lot at No. 529 East Eleventh street, in the borough of Manhattan, city of New York.

It appears from the agreed statement of facts that the plaintiff, on March 21, 1919, held two policies of fire insurance issued by the defendant for \$5,000 each. By the 5th paragraph of the agreed statement of facts it was stipulated as follows: "The property insured in and by said policies was as follows: The brick building and extension thereto, occupied as store and dwelling, situate No. 529 East 11th Street, Borough of Manhattan, City of New York, including also all fixtures; also stoop, sidewalk, mason and ironwork in front and fences and yard fixtures in rear thereof."

The premises upon which the insured property stood consisted of a lot twenty-five feet wide in front and rear, by one hundred feet in depth on both sides, and for thirty years there were located on said premises two buildings, namely, one, which was the larger building, of brick, four stories in height, located on the front of said premises at No. 529 East Eleventh street. Another building, which was smaller, but also of brick, two stories in height, stood on the rear of said premises, distant from the first above-mentioned building about twenty-five feet, and physically entirely separate and detached from the main building facing the street. Access to said building in

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the rear from the street was only by means of passing through the main building located on the front of said premises. The policies of insurance were issued without any inspection or independent examination of the premises at the time when said policies were issued.

It was further stipulated and agreed that at and prior to the issuance of said policies of fire insurance the defendant had an atlas or map of buildings in the city of New York in its office from which it correctly appeared that there was a building on the front and another building on the rear of said premises, and it then knew of the existence of said buildings, and that the defendant at the time of issuing the respective policies, based its premium of insurance upon the rate fixed by the New York board of fire underwriters for the building used for store and dwelling purposes, and that no extra rate of premium for insurance would have been charged had said policies specifically described the front and rear buildings aforesaid, in which case the amount of insurance on each building would have been expressed in the policies and apportioned between the buildings so specifically described.

On March 21, 1919, while both said policies were in force and effect, a fire occurred in the building located on the rear of said premises. No damage whatever was caused by said fire to the building located in the front of said premises, or any part thereof, nor to any of the fixtures, stoop, sidewalk, mason or ironwork in front or fences in yard or yard fixtures in the rear of the same.

It was further stipulated in the said agreed statement of facts that on the dates of the issuance of said policies of insurance the only building located on said premises marked with the street number "529" was the main building in the front of said premises facing the street.

It was also further stipulated and agreed by the parties that on the date of the issuance of said policies the only building located on said premises occupied as a store and dwelling was the building located on the front of said premises.

The agreed statement of facts further shows that the net cash value at the date of said fire of the building located on the front of said premises was \$9,000, and of the building located on the rear thereof, \$2,500. After the fire and within

the time prescribed by said policies the plaintiff duly presented and filed with the said defendant due proofs of loss in the forms accepted by the defendant, which contained a schedule of the damage by fire duly executed and verified by the plaintiff as the assured in accordance with the form required by said policies, and thereafter an appraisal agreement in accordance with the form issued by the defendant was duly executed and filed with said defendant; that the appraisers thereafter fixed said loss and damage to the plaintiff by said fire to the building located in the rear of said premises at the sum of \$400; that said appraisal was made as provided by the terms of said policies, but without prejudice to the defendant with respect to any of its rights.

The defendant refused to pay plaintiff the amount of her said loss and damage on the specific ground that the policies covered only the brick building in the front of said premises occupied as a store and dwelling; whereas the fire occurred in and damage was thereby caused to the building in the rear of said premises, and defendant duly notified the plaintiff that by reason thereof it denied liability for the loss suffered by this plaintiff as aforesaid.

It is the contention of the plaintiff, and the trial court held, that the policies of insurance in question covered not only the brick building on the front of said premises, occupied as a store and dwelling, but also covered the building damaged by fire, and granted judgment in plaintiff's favor for the amount of her loss as fixed by said appraisers. The Appellate Term, by its determination, has affirmed the judgment of the Municipal Court. (112 Misc. Rep. 445.)

I am of the opinion that the judgment of the Municipal Court and the order of the Appellate Term affirming the same must be reversed. The policies of insurance covered only the brick building and extension thereto, *occupied as store and dwelling*, situate at No. 529 East Eleventh street, borough of Manhattan, city of New York, including also all fixtures; all stoop, sidewalk, mason and ironwork in front and fences and yard fixtures in the rear thereof. No other property of the plaintiff was embraced in the policies. It was stipulated by the parties that no damage whatever was by said fire caused to the building thus covered, nor to any of the fixtures, stoop,

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sidewalk, mason or ironwork in front, or fences in yard or yard fixtures in the rear of the same. It was further stipulated and agreed by the parties that on the date of the issue of said policies the only building located on said premises occupied as a store and dwelling was the building located on the front of said premises, and which, as before stated, it was stipulated was not damaged as the result of the fire. It seems to me that the particular description of the insured property as the brick building and extension thereto, *occupied as store and dwelling*, situate at No. 529 East Eleventh street, accompanied by the further stipulation that said building was the only building located on said premises which was occupied as a store and dwelling, and the fire not having occurred therein, and the same being uninjured, are insurmountable obstacles in the path of plaintiff's recovery in this action. Had the description of the insured property been, "the brick building, occupied as a store and dwelling and extension thereto," a different situation would have been presented. Had the insured property been thus described, the numerous authorities upon which the respondent relies, and which the learned Appellate Term cites in support of its determination, to the effect that the term "extension" is synonymous with the term "addition," and that where a policy covers property and its extensions and additions it is not necessary, in order to cover out-buildings or structures constituting such additions or extensions that the same should be physically connected with the main property covered by the policy of insurance, would be pertinent. (*Gertner v. Glens Falls Ins. Co.*, 193 App. Div. 836; *Ideal Pump & Mfg. Co. v. American Central Ins. Co.*, 152 S. W. Rep. 408; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307; *Maisel v. Fire Association*, 59 App. Div. 461.) But here the description is "the brick building and extension thereto, *occupied as store and dwelling*." Concededly the building damaged by the fire here was not occupied as a store and dwelling, and, therefore, even if it be regarded as an extension to the main building, it was not covered by the policies of insurance. To what use the building damaged was put by the owner does not appear. So far as the record discloses, it may have been devoted by the plaintiff to a use entirely foreign to store and dwelling purposes.

The learned Appellate Term has stated, and the respondent contends, that there is an ambiguity in the description of the property intended to be covered by these policies, and that, therefore, under the doctrine of *Herrman v. Merchants' Ins. Co.* (81 N. Y. 184), *Allen v. St. Louis Ins. Co.* (85 id. 473), and kindred decisions, the policies should be construed most favorably to the insured. The difficulty is that I find no ambiguity in the policies in suit. The description of the insured property was very precise as, "The brick building and extension thereto, occupied as store and dwelling, situate No. 529 East 11th Street, Borough of Manhattan, City of New York," etc. The fact that on the rear of the lot on which the insured building stood there was situate another building not occupied as a store and dwelling, it seems to me, creates no ambiguity as to what was intended by the parties in issuing and accepting the policies in suit.

The determination of the Appellate Term should be reversed, with costs, the judgment of the Municipal Court reversed, with costs, and the complaint dismissed, with costs.

CLARKE, P. J., and SMITH, J., concur; LAUGHLIN and PAGE, JJ., dissent.

Determination reversed, judgment of Municipal Court reversed and complaint dismissed, with costs to defendant in all courts.

GEORGE P. BRECKENRIDGE, Appellant, v. MELBERT B. CARY and ADELE LEC. ADAMS, as Administratrix, etc., of JOHN H. MILLER, Deceased, Respondents.

First Department, February 4, 1921.

Equity — accounting between members of law firm — right to accounting as to funds paid to firm conditionally and held by one member in trust to await happening of condition — right of plaintiff to judgment where condition happened after action commenced — costs as discretionary.

A member of a dissolved law partnership may maintain a suit to compel an accounting for moneys received by the firm as fees conditionally on the happening of a future event, where said moneys were given to one of the

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members of the firm, with the consent of the others, to be held in trust for the firm, to await the happening of the condition, and by him deposited in his personal account and to a certain extent squandered by him, though at the time of the commencement of the suit the condition had not happened which would give the firm the absolute title to the moneys.

Said condition having been fulfilled before the trial of the suit it was error for the court to dismiss the complaint, since the action being in equity, the judgment should be based on conditions existing at the time of its rendition.

In equitable actions costs are always in the discretion of the court, and the court properly might refuse the plaintiff costs because of the fact that the plaintiff's claim to share in the said moneys had not ripened at the time the action was commenced.

APPEAL by the plaintiff, George P. Breckenridge, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 16th day of July, 1920, upon the decision of the court rendered after a trial at the New York Special Term.

George P. Breckenridge, in person.

Frank J. McEwen of counsel [*Cary, Miller & McEwen*, attorneys], for the respondents.

MERRELL, J. :

This action is in equity for an accounting between copartners.

On or about April 30, 1916, the plaintiff, the defendant Melbert B. Cary, and one John H. Miller, since deceased, all attorneys and counselors at law, practicing their profession in the city and county of New York and elsewhere, entered into a copartnership for the practice of law under the firm name and style of Cary, Miller & Breckenridge. Pursuant to such partnership agreement the plaintiff was entitled to one-third of any fees received by said firm in any matters in which he assisted either or both of his copartners. Said copartnership continued until May 1, 1917, when the same was dissolved by mutual consent.

In March, 1917, said firm represented one McAlpin in the prosecution of a claim against the Matanzas Blaugas Company of Cuba for moneys loaned to the amount of \$4,500. On or about March 6, 1917, the said firm received of McAlpin certain

moneys amounting to over \$1,500, and it was thereafter agreed that \$1,000 thereof should be retained by the said firm as its fee to reimburse it for expenses and services in connection with the prosecution of said McAlpin claim, but that said moneys should not belong to said firm until certain bonds of the said Blaugas Company were delivered to McAlpin in payment of his said claim for moneys loaned. The \$1,000 which said law firm was to receive in payment for its expenses and services in connection with said matter were deposited by the defendant Cary to the credit of his personal account in the Empire Trust Company on or about the date of the receipt thereof by said firm. Such deposit was made with the consent of all three members of the firm including the plaintiff, and upon the understanding that the defendant Cary should hold the same in trust for himself and his copartners until the delivery of said bonds of the Blaugas Company to McAlpin, when the firm should be entitled to use and appropriate said moneys. The evidence shows that the defendant Cary failed to keep said balance thus deposited to the credit of his personal account intact, and that, with the exception of one or two months succeeding said transaction, his personal account in said trust company was much less than the amount of the trust fund thus held by him, his balance in said trust company at the end of April, 1917, being less than \$300. McAlpin died before the consummation of the settlement of his claim by the delivery of the bonds. This action was commenced by the plaintiff for an accounting prior to the delivery of said bonds. Prior to the commencement of this action John H. Miller, one of said copartners, died, and the plaintiff joined the administratrix of his deceased partner with the defendant Cary as defendants herein. Evidence was given upon the trial that on the very day when the trial commenced the Blaugas bonds were delivered to the personal representatives of McAlpin, and thereupon the plaintiff became entitled to share in the proceeds of the \$1,000 held by the defendant Cary in trust. The evidence also disclosed that prior to the commencement of the action the plaintiff had received by way of advancements upon his share in said \$1,000 held in trust by the defendant Cary the sum of \$135.55, and it, therefore, appeared that at the time of the trial, the said copartnership being then entitled

to appropriate said moneys held in trust by the defendant Cary, the plaintiff was entitled to one-third of said moneys, less the advancements to him, leaving \$197.78 his due. At the close of the evidence the court held that the plaintiff was entitled to judgment against the defendants for said balance his due, but without costs, and directed that a decree be submitted accordingly. Notwithstanding the announcement of the learned court at the close of the evidence, the court thereafter made a decision awarding defendants judgment dismissing the plaintiff's complaint, with costs, and judgment was directed accordingly. The justice presiding handed down a brief memorandum accompanying such decision to the effect that at the commencement of the action the money in suit had not been earned, and hence that the plaintiff had no cause of action; that the defendants were within their rights in refusing plaintiff's demands, and that since the suit was based on such refusal, plaintiff's action must fail. In the opinion of the court the fact that plaintiff's immature claim had subsequently ripened could not avail the plaintiff in this action, and that should the defendants, at the time of the decision, refuse a similar demand by plaintiff, plaintiff would then have a cause of action; that defendants expressed their willingness and readiness to pay the amount then concededly due plaintiff. Upon such grounds the court dismissed the plaintiff's complaint.

I think the court clearly erred in thus disposing of the case. It seems to me entirely clear that the plaintiff, who was concededly interested in the \$1,000, had a right of action at the time of the commencement of this action, to have determined his interest in said fund. It is always the right of one copartner to demand of the other members of his firm an accounting as to matters in which they are jointly interested. Even though plaintiff's claim to his share in the moneys held in trust by the defendant Cary had not ripened at the time of the commencement of the action, nevertheless, the evidence showing that the defendant Cary had deposited these moneys to his personal account, had checked therefrom and depleted said account, practically wiping out any balance in the trust company in which said moneys were deposited to his credit, amply justifies plaintiff's demand for an accounting by his former copartners.

Moreover, this action being in equity, the judgment of the court should properly be based upon conditions existing at the time of the rendition of the judgment, and courts of equity uniformly base their judgments accordingly. Concededly, at the time of the rendition of the judgment herein, the \$1,000 had been earned by plaintiff's said firm, and plaintiff was then concededly entitled to share therein. It would be an idle and useless ceremony to compel the plaintiff to bring a new action to obtain rights which had clearly ripened prior to the rendition of judgment. In equitable actions, costs are always in the discretion of the court, and the court properly might refuse the plaintiff costs as is stated at the close of the evidence in this case because of the fact that plaintiff's claim to share in the said moneys had not ripened at the time the action was commenced, but I do not think the court was justified in refusing the plaintiff relief to which he was clearly entitled prior to the decree herein. (*Milliken v. McGarrah*, 164 App. Div. 110.) Were plaintiff's action at law, the dismissal of the complaint would have been entirely proper, but in equitable actions, such as this, the plaintiff should receive whatever relief was his due at the time of the trial. (*Merrihew v. Kingsbury*, 150 App. Div. 40.)

The findings of fact contained in the decision of the court herein inconsistent with the views here expressed should be disapproved, and the judgment of the court below should be reversed, and plaintiff, upon appropriate findings of fact and conclusions of law, should have judgment against the defendants for the relief demanded in the complaint, without costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,
concur.

Judgment reversed and judgment ordered for plaintiff for the relief demanded in the complaint, without costs. Settle order on notice.

SUSQUEHANNA STEAMSHIP COMPANY, INC., Respondent, v.
A. O. ANDERSEN & Co., INC., Appellant.

First Department, February 4, 1921.

Conflict of laws — when State court has no right to enjoin proceedings in United States court — inability of plaintiff to set up all its defenses or counterclaims — multiplicity of actions.

In a suit for an accounting and for an injunction restraining the defendant from prosecuting two actions in the United States District Court, one in the Southern District of New York to recover from the plaintiff and others an amount claimed to be due under a charter party, and the other in the Eastern District of Virginia to recover from the plaintiff upon the same cause of action in which a writ of foreign attachment was issued, and a steamship belonging to the plaintiff seized, held, that the plaintiff has not established any ground for an injunction, and that the defendant acted with diligence and the Federal courts have jurisdiction of the parties and of the subject-matter of the litigation and can do full justice between the parties.

The fact that the plaintiff has not been able to set up all the defenses or counterclaims to which it thinks it is entitled is no ground for interfering with the orderly procedure of a court which has power in appropriate actions therein to determine all the claims of every party to the controversy. Nor is there merit in the plaintiff's claim that a multiplicity of actions furnishes a basis for the relief sought.

APPEAL by the defendant, A. O. Andersen & Co., Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of December, 1920, granting plaintiff's motion for an injunction *pendente lite*.

Herman S. Hertwig of counsel [*John A. McManus* with him on the brief; *Duncan & Mount*, attorneys], for the appellant.

Alvin C. Cass of counsel [*Cass & Appel*, attorneys], for the respondent.

DOWLING, J.:

The controversy between these parties arises out of the charter of the steamship *Lydia* by the Lydia Steamship Company to F. E. Crotois on September 12, 1919, for six months

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at a monthly charter hire of \$59,380, payable in advance. Simultaneously with the making of this charter, the defendant entered into a written agreement with the Lydia Steamship Company, as to the legal effect of which there is a dispute. Plaintiff claims that the instrument is an original promise by defendant to pay the amount of the charter here in full to plaintiff. Defendant claims that it agreed only to attend to the collection of the charter hire, to advance to the Lydia Steamship Company the amount of the charter hire when it fell due and to reimburse itself therefor when the amount was collected from Crotois or his guarantors, but without any liability for the debt. Under date of September 13, 1919, defendant was directed to make its payments under the agreement to the plaintiff, to which it did in fact pay two months' charter charges. Crotois became insolvent and the claim was then made that defendant was under an absolute duty to pay the charter hire, which claim it rejected. Thereupon the Lydia Steamship Company and the defendant entered into a written agreement on November 28, 1919, by which in effect the ship was to be turned over to defendant to operate as agent for the balance of the charter term and it was to continue to pay the monthly charter payments without prejudice to its rights. When the period of the charter had expired, there was to be an effort made to work out an amicable adjustment of the questions involved between the parties, and if such adjustment could not be had, the questions involved were to be settled by arbitration or by suit. This agreement was assigned by the Lydia Steamship Company to plaintiff on February 24, 1920. All the stock in both these companies is owned by Frank Auditore and Joseph Auditore.

The vessel was operated under this agreement. In December, 1919, defendant made a charter for the vessel with plaintiff to carry a cargo of sugar (which plaintiff had contracted to carry for Lamborn & Co.) from Cuba to Holland in February, 1920, for the sum of \$147,867.46, payable ten days after receipt of cable advice from the master of the ship that the vessel had been loaded and bills of lading signed. Disputes arose as to the party who would sign the contract of carriage, but it was signed ultimately by plaintiff, with an assignment to defendant of sufficient of the moneys to become due from

Lamborn to plaintiff to pay the charter hire due from plaintiff to defendant, which assignment Lamborn & Co. refused to recognize. Being called upon by defendant for further assurance of the freight charges, it was given by the personal guaranties of Frank Auditore and Joseph Auditore. The plaintiff on February 24, 1920, took assignments of all the rights of the Lydia Steamship Company under the Crotois charter, the agreement of September twelfth between the Lydia Company and defendant and the agreement of November twenty-eighth. Advice was received on February 16, 1920, that the vessel had been loaded and the bills of lading signed, as the result of which, under the terms of the charter, the charter hire is claimed to have become due from plaintiff to defendant on February 26, 1920. Defendant claims that although it had complied with all its duties under its agreement and had made payments amounting to \$296,900, and had further incurred over \$20,000 of obligations in the operation of the *Lydia*, the plaintiff and the Auditores refused to pay the charter hire that fell due on February twenty-sixth. Defendant being unable to obtain any part of the charter hire, notified plaintiff and the Auditores on March 4, 1920, that it was unable to operate the vessel further under the circumstances, and abandoned it in Amsterdam, Holland. There are numerous details of the dealings between the parties to which it is unnecessary to refer, but it is apparent that the question of who was guilty of the breach of the agreement between the parties is one which will be bitterly contested and will involve a multitude of conflicting claims. There is also a controversy as to the legal effect of the instruments executed by the parties. Many questions must be decided before the legal rights of the parties can be determined.

The defendant lost no time in taking legal action to enforce its claimed right under the charter to carry the cargo of sugar.

(1) On March 4, 1920, defendant filed a libel in the United States District Court for the Southern District of New York to recover from the Susquehanna Steamship Company (this plaintiff) and Frank Auditore and Joseph Auditore as guarantors, the sum of \$147,867.45, claimed to be due under the charter party of December 29, 1919.

(2) On March 5, 1920, defendant filed a libel in the United States District Court for the Eastern District of Virginia to recover from the Susquehanna Steamship Company upon the same cause of action, and in that suit issued a writ of foreign attachment and seized the steamship *Susquehanna* belonging to said company and placed a United States marshal on board and plaintiff was compelled to give a stipulation for value for \$147,867.37 to release the vessel and permit it to sail, giving a surety company bond at an expense to it of \$1,400.

(3) Defendant commenced an action in the Supreme Court, New York county, against the firm of Lamborn & Co. to recover the sum of \$147,867.37, upon the alleged assignment of freight moneys, dated December 29, 1919.

It is not necessary to enter into a consideration of the various steps already taken in these actions. On November 11, 1920, plaintiff commenced this action in the Supreme Court, New York county, setting forth at length all the transactions between the parties and the pendency of the three actions referred to and asked judgment as follows:

(1) That the agreement of the defendant dated September 12, 1919, is a good and valid contract on its part to pay the charter hire as the same should become due to the Lydia Steamship Company, Inc., under its charter with F. E. Crotois (Exhibit A), attached to this complaint.

(2) That the defendant defaulted and breached its agreement by a refusal to pay charter moneys which became due November 27, 1919, and by its insistence upon the making of said agreement of November 27, 1919, and it further breached its agreement by the failure to pay the moneys due for the month of February 27 to March 27, 1920, and again for the month of March twenty-seventh to April twenty-seventh, and again for the time April 27 to May 21, 1920, and it is now in default therefor.

(3) That the charter of December 29, 1919, for the steamship *Lydia* by the defendant to the plaintiff was made by the defendant as the managing agent of the plaintiff and without any financial interest of the defendant therein except in the carrying out of its agency so long as such agency should continue.

(4) That the agency of the defendant under said charter

terminated by its breach of contract and by agreement of the parties prior to the commencement of this action in the United States District Court for the Southern District of New York against this plaintiff to recover alleged charter hire and prior to its commencement of a similar action in the United States District Court for the Eastern District of Virginia, and prior to its commencement of its action for alleged assignment of freight moneys against Lamborn & Co. in the Supreme Court, New York county, and thereby this plaintiff became released and discharged from its obligation to pay said sum of \$147,867.37 or any part thereof sued for in said actions 1 and 2 in the United States District Court.

(5) That the assignment by the Lydia Steamship Company, Inc., of February 24, 1920, to this plaintiff was a good and valid assignment and transferred all the rights of the Lydia Steamship Company against said defendant and by reason thereof this plaintiff became the principal under said charter between A. O. Andersen & Co., Inc., as agent and the Susquehanna Steamship Company, Inc., dated December 29, 1919.

(6) That the assignment, request or instruction of Lamborn & Co. to pay freight moneys to the defendant dated December 29, 1919, was taken by said defendant as a managing agent for the Lydia Steamship Company, Inc., and that it had no financial right, claim or interest in said moneys and was taken conditional upon the acceptance thereof by the said Lamborn & Co. and became lapsed and void through the agreement of the parties subsequent thereto and the substitution of the guaranty of Frank and Joseph Auditore dated January 30, 1920 (Exhibit F), attached to this complaint.

(7) That both the obligation of Lamborn & Co. to pay said sum of \$147,867.37 to the defendant or of Frank and Joseph Auditore to carry out their guaranty dated January 30, 1920, lapsed and became void by the termination of the agency of the defendant to act for said Lydia Steamship Company, Inc.

(8) That there are no moneys due from this plaintiff to the defendant, but that upon the contrary the plaintiff have judgment against the defendant for the sum of \$59,063.59 charter moneys due to it as the assignee of the Lydia Steam-

ship Company, Inc., under the agreement of the defendant dated September 12, 1919.

(9) That the defendant be required to account for all the earnings and disbursements received and made by it as the agent of the steamship *Lydia* under the terms of the agreement of November 28, 1919, and be required to turn over to and account to this plaintiff as the assignee of said *Lydia* Steamship Company for any balance so collected by it.

(10) That the defendant be forever enjoined and restrained from prosecuting said actions in the United States District Court for the Southern District of New York and in the United States District Court for the Eastern District of Virginia to recover the sum of \$147,867.37 or any part thereof, and that it be permanently enjoined and restrained from suing this plaintiff for any charter moneys claimed under the charter between the defendant as agent and this plaintiff dated December 29, 1919 (Exhibit D), attached to this complaint.

(11) That the defendant be permanently enjoined and restrained from bringing its action against Arthur H. Lamborn and others comprising the firm of Lamborn & Co. to recover the said sum of \$147,867.37 under the said request, instruction or assignment dated December 29, 1919 (Exhibit E), attached to the complaint.

(12) That the plaintiff have such other and further relief as to the court may seem just, together with the costs and disbursements of this action.

On November 12, 1920, plaintiff obtained an order to show cause why an injunction *pendente lite* should not issue restraining defendant from bringing to trial its three suits, and meantime their prosecution was enjoined. On December 18, 1920, the order was made whereby upon plaintiff's giving an undertaking in the sum of \$165,000, defendant was enjoined and restrained during the pendency of this action from proceeding further with the prosecution of the suit brought by it in admiralty in the United States District Court for the Southern District of New York against the plaintiff and Frank Auditore and Joseph Auditore to recover the sum of \$147,867.37 and interest; also from proceeding further with the prosecution of the suit brought by it against the plaintiff in admiralty in the United States District Court for the Eastern

District of Virginia, to recover the sum of \$147,867.37 with interest; also from proceeding further in the prosecution of the suit brought by it in the New York Supreme Court, New York county, against Arthur H. Lamborn and others, copartners trading under the firm name and style of Lamborn & Co., to recover \$147,867.37 with interest.

Plaintiff concedes that the general rule as to the right of State courts to enjoin proceedings in the United States court is as laid down by Judge WILLARD BARTLETT in *Beardslee v. Ingraham* (183 N. Y. 411) as follows (at p. 417): "The general rule that there is no authority in the State courts to enjoin proceedings in the courts of the United States is laid down as distinctly as a judicial proposition can be declared and the correctness of the conclusion finds ample support in the authorities cited. (See *Peck v. Jenness*, 7 How. [U. S.] 612, 624; *Riggs v. Johnson County*, 6 Wall. 166; 2 Story's Equity Jur. § 900; *Moran v. Sturges*, 154 U. S. 256.) In the case last cited (which was a reversal of *Matter of Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169), the question was whether it was within the power of a State court to restrain the libellants in a District Court of the United States from prosecuting their libels, and the chief justice declared the general rule to be 'that State courts cannot enjoin proceedings in the courts of the United States,' and reviewed a large number of authorities sustaining that doctrine. Furthermore, it is 'a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court.' (*Moran v. Sturges*, *supra*, on p. 274.)"

But plaintiff claims that there is an exception to this rule, namely, that the right to enjoin exists where the United States courts have not jurisdiction to properly try the issue and to do justice between the parties, and an irreparable injury will, therefore, result. And it calls attention to the decision handed down by the Supreme Court of the United States on December 6, 1920, in *Wells Fargo & Co. v. Taylor* (254 U. S. 175; 41 Sup. Ct. Rep. —). Therein the court in sustaining a permanent injunction against the enforcement of a judgment obtained in a court of the State of Mississippi, obtained on the ground that an injustice was created against the company by the judgment,

considered the effect of section 265 of the Judicial Code (36 U. S. Stat. at Large, 1162), formerly section 720 of the United States Revised Statutes (U. S. Comp. Stat. 1916, § 1242), providing that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The court said: "The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule-of comity, and, like that rule, is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the State courts and is salutary; but to carry it beyond that field would materially hamper the Federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which, of course, is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal courts from enjoining the institution in the State courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States [citing cases], or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the State courts [citing cases], or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a State court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience" (citing cases).

We deem it sufficient for the disposition of this appeal to hold that plaintiff has not established any ground for the injunction sought. Defendant acted with diligence, and selected its forum for the determination of its claim against plaintiff. The court in which it commenced its actions had jurisdiction of the parties and of the subject-matter of the

litigation. In one of these actions defendant secured an attachment of plaintiff's property and obtained an undertaking to secure any judgment it might obtain. I am unable to find any support for the contention that the United States courts cannot do full justice between the parties, all of whom are subject to their jurisdiction. The fact that plaintiff has not been able in any particular case to set up all the defenses or counterclaims to which it thinks it is entitled is no ground for interfering with the orderly procedure of a court which has power in appropriate actions therein to determine all the claims of every party to this controversy. The proper tribunal to administer justice between them is the Federal court, which already has jurisdiction and wherein defendant has already obtained security for its claim. The arguments advanced by plaintiff do not satisfy us that any injustice can possibly result to it from the prosecution of these actions or that it will be denied the protection of any of its rights by a lack of power in the Federal courts. Nor is there merit in the claim that a multiplicity of actions furnishes a basis for the relief sought. There are but two actions brought by defendant wherein plaintiff is a party defendant and one of these was brought that the liability of the Auditores, who own all the stock of plaintiff, as guarantors upon its agreement, might be determined.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., PAGE and GREENBAUM, JJ., concur.

LAUGHLIN, J. (concurring):

Both comity and inability to enforce the order or decree forbid one court from attempting to interfere with property over which another court of competent jurisdiction has assumed jurisdiction by taking the property into *custodia legis*, or from attempting to *enjoin a court* of competent jurisdiction or proceedings therein; but my understanding of the law is that, without contravening these principles, in a proper case a party, over whom a court has acquired jurisdiction, may be *stayed* from prosecuting an action or proceeding

in another court, whether State or Federal, which has not sufficient jurisdiction to hear and decide all of the issues between the parties and to grant full and complete relief with respect thereto. The opinion of Mr. Justice DOWLING seems open to implications to the contrary, and, therefore, with the expression of these views I concur in the result.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

SUNRISE LUMBER COMPANY, INC., Respondent, v. HOMER D.
BIERY LUMBER COMPANY, Appellant.

Second Department, January 14, 1921.

Process — Code of Civil Procedure, section 432, subdivision 1, construed — service of summons and complaint on president of foreign corporation temporarily within State — service set aside where corporation not doing business within State — when corporation not doing business within State.

Under subdivision 1 of section 432 of the Code of Civil Procedure the president of a foreign corporation may be served with a summons and complaint within this State only when said corporation is properly a defendant; that is, when it is doing business within the State.

In an action against a foreign corporation the service of a summons and complaint on the president while he was temporarily stopping in this State, not on the business of the defendant, should be set aside where it appears that the defendant had then in this State no agent to accept service of process, no bank account here, held no directors' or other meetings here and had no property within the State, and the only basis for the contention that said defendant was doing business here was that, on one occasion, the defendant's sales manager solicited and received an order for goods from the plaintiff which was confirmed by letter from the defendant's home office, and that the defendant maintained a fiscal agent here for the purpose of selling its corporate stock, and at one time published here a notice of a declaration of dividend which was dated at its home office.

The casual and occasional soliciting of orders within the State does not constitute the doing of business within the State within the jurisdictional sense.

APPEAL by the defendant, Homer D. Biery Lumber Company, appearing specially herein for the sole purpose of moving

to set aside the service of the summons and complaint herein, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 20th day of October, 1920, denying defendant's motion to set aside the service of the summons and complaint.

James H. Purdy, Jr. [*A. F. Von Bernuth* with him on the brief], for the appellant.

Charles Soble, for the respondent.

MILLS, J.:

There really is no dispute about the facts in this case, although there is some variance between the opposing affidavits as to the inferences to be deduced from the specific facts stated.

Plaintiff is a domestic corporation, and defendant a foreign one; the latter organized under the laws of Delaware. Defendant's president, on August 19, 1920, was temporarily stopping at the Biltmore Hotel, New York city, not at all upon the business of defendant, and was there served with the summons and complaint. Defendant had then in New York no agent to accept service of process, no bank account therein, held no directors' or other meetings therein, and had no property therein. The ground of the motion was that the defendant was not doing business within this State. The learned justice, in making his decision, filed no opinion.

By a literal reading of subdivision 1 of section 432 of the Code of Civil Procedure it would seem that service upon the president of a foreign corporation within the State is sufficient; but our Court of Appeals, in an effort to uphold that provision as constitutional and valid, held that its true meaning is that such service may be made only when the foreign corporation is properly a defendant; that is, when it is doing business within the State. (*Dollar Co. v. Canadian C. & F. Co.*, 220 N. Y. 270, 277.) It may be remarked that it would not be easy to find a decision upon the point better illustrating the length to which a court may go to save the constitutionality of a statute, which otherwise would be invalid as violating section 1 of the Fourteenth Amendment to the Federal Constitution. This holding constituted a modification of the rule previously

asserted by that court in *Pope v. Terre Haute Car Mfg. Co.* (87 N. Y. 137) and allied cases. That modification was made with due regard to the decision of the United States Supreme Court in *Riverside Mills v. Menefee* (237 U. S. 189).

The test, therefore, here is: Was the defendant corporation doing business within this State? What, for the purpose of jurisdiction, constitutes "the doing of business within this State," was discussed and determined by the Court of Appeals in *Tauza v. Susquehanna Coal Co.* (220 N. Y. 259). In that case the defendant, a Pennsylvania corporation, maintained a branch office in New York city in charge of an agent having eight salesmen under him, where they solicited and received orders for the purchase of defendant's product, but transmitted such orders to the main office at Philadelphia, where such orders were confirmed and finally accepted. The court held that that was a sufficient doing of business within this State, citing as authority the case of *International Harvester Co. v. Kentucky* (234 U. S. 579), wherein it was held that a like course by the defendant, a foreign corporation within that State, constituted a doing of business therein, although the defendant maintained no office within that State, but simply regularly maintained therein a corps of selling agents, who reported their sales to defendant's general agent at its home office, who there approved them.

The intimation of that decision is that, if the soliciting and taking of orders within the State had been casual and occasional, it would not have constituted a doing of business within the State in the jurisdictional sense. That distinction seems reasonable; otherwise, nearly every business house in New York city would have to be held to be doing business within every State in the Union, because its traveling salesmen occasionally visit such State and there solicit orders. Applying this test to the facts in this record, and construing the affidavits most favorably to plaintiff, respondent, as we should do, we find simply the following, viz.:

(a) Defendant's sales manager, upon one occasion, March 5, 1920, visited plaintiff's office in New York city and there solicited a purchase of lumber from the plaintiff, which purchase, however, was confirmed by a letter of the defendant written from defendant's home office at Franklin, Penn.

(b) Defendant maintained a fiscal agent at No. 280 Broadway, New York city, for the sale of its corporate stock.

The above are the only specific facts appearing which indicate any doing of business by the defendant within this State. The affidavits submitted in behalf of the defendant attempted to explain those facts by showing that it has an arrangement with a certain New York brokerage concern for the sale, upon commission, of a certain quantity of its corporate stock, and that that concern published in New York various advertisements for the sale of the stock, stating certain material facts in reference to defendant's business and financial status, but that they were merely agents to sell the stock, and further, that the said purchase from plaintiff was consummated by a letter written from the home office in Pennsylvania. It further appeared in plaintiff's affidavits that defendant, last September, published in the *New York Times* a notice of its declaration of dividend, such notice, however, being dated at Franklin, Penn. It seems to me that within the above-stated rule the defendant was not doing business within this State. The soliciting in New York city by its manager of a purchase from plaintiff did not constitute that. A selling by its fiscal agent of its stock in New York city was of no greater effect in that direction. There is scarcely a considerable corporation anywhere in the United States which does not attempt to sell its stock and bonds through Wall street houses. Such selling is not a doing of business by the corporation. The business of this defendant is manufacturing and marketing lumber; not at all the sale of stock.

I advise, therefore, that the order appealed from be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

JENKS, P. J., RICH, BLACKMAR and JAYCOX, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

SPENCER ALDRICH, Plaintiff, v. GREAT AMERICAN INSURANCE
COMPANY, New York, Defendant.

First Department, January 14, 1921.

**Insurance — validity of coinsurance clause in fire insurance policy —
Insurance Law, section 121, as added by chapter 440 of the Laws
of 1917, construed.**

The parties to a fire insurance contract are not prohibited by chapter 440 of the Laws of 1917, adding section 121 to the Insurance Law, and the standard fire insurance policy thereby adopted, from agreeing, in consideration of a reduced rate of insurance to the assured, that an eighty per cent average or coinsurance clause shall be attached to the standard form of policy.

PAGE, J., dissents.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Sidney H. Stuart, for the plaintiff.

George Richards of counsel [*Richards & Affeld*, attorneys], for the defendant.

LAUGHLIN, J.:

The point presented for decision by this submission is, whether the parties to a fire insurance contract are prohibited by chapter 440 of the Laws of 1917, adding section 121 to the Insurance Law, and the standard fire insurance policy thereby adopted, from agreeing, in consideration of a reduced rate of insurance to the assured, that an eighty per cent average or coinsurance clause shall be attached to the standard form of policy, by which, in the event that the assured does not carry insurance to the extent of eighty per cent or more of the value of the property insured, the insurer shall not be liable for a greater proportion of any loss or damage to the property than the sum insured bears to eighty per cent of the actual cash value of the property at the time of the loss. The standard form of policy in use when the insurance policy to which this insurance relates was issued contains in lines 101

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to 105, inclusive, a clause with respect to "*pro rata* liability" in cases of other insurance, by which it is provided that the insurer "shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not." Like provisions with others were contained in lines 96 to 98, inclusive, of the standard form of policy in use at the time of the enactment of the last-mentioned statute. (Richards Ins. Law [3d ed.], 722; 1 Clement Fire Ins. 479.) At the time of the enactment of said statute a form for an average clause in blank with respect to the percentage, and providing also that no special inventory or appraisalment of the undamaged property shall be required where the loss claimed does not exceed five per cent of the maximum amount named in the policies written thereon and in force at the time of the loss, and that if the insurance be divided into two or more items these clauses shall apply to each clause separately, had been filed with and approved by the Superintendent of Insurance but was not included in the standard form, and it was lawful for the insurer and the assured to contract with respect thereto and to attach the average or coinsurance clause to the policy as a rider. (Richards Ins. Law, 733; Laws of 1913, chap. 181, amdg. Ins. Law, § 121.) The stipulated facts show that a standard form of fire insurance policy was issued to the plaintiff by the defendant after the enactment of said amendment in 1917 and that the parties agreed in writing to an average clause with exemption of special inventory or appraisalment in certain cases, there designated as an "Eighty Per Cent Average Clause," in the identical form of the clause theretofore authorized and in use, and attached the same to the policy as a rider. The defendant has paid the amount due to the plaintiff on account of the loss if this clause is valid. If it be invalid, there is a balance still due and owing, for which the stipulation authorizes a judgment in favor of the plaintiff, but if the clause be valid the defendant is to have judgment, and in either event the judgment is to be without costs. In the absence of such an average or coinsurance clause, the assured is entitled to collect his entire loss not exceeding the amount of the insurance; but under this average clause, if both the amount of the

loss and the amount of the insurance are less than the percentage of the value of all the property insured, there cannot be a full recovery for the loss. (*Farmers' Feed Co. v. Scottish Union Ins. Co.*, 173 N. Y. 241.) In other words, if the insurance represents eighty per cent or more of the value at the time of the loss of all the property insured, full recovery of the loss may be had; but if the insurance is for less than eighty per cent of such value, then the recovery is limited to the proportion of the loss which the amount of the insurance bears to eighty per cent of the value at the time of the loss of all the property insured. (*Farmers' Feed Co. v. Scottish Union Ins. Co.*, *supra.*) As, for example, if the value of the property insured be \$10,000 and the insurance be \$8,000 or more, the entire loss, whether of all or part of the property insured to the extent of the amount of the insurance is recoverable; but if the amount of the insurance in such case was only \$5,000, the assured could recover only five-eighths of the loss, whether of all or of part, not exceeding the amount of the insurance.

Chapter 488 of the Laws of 1886 provided, among other things, for the preparation and filing in the office of the Secretary of State by the New York board of fire underwriters on or before October fifteenth, or in default thereof, by the Superintendent of Insurance on or before November fifteenth of that year, a form of fire insurance policy "together with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy," and that such form of policy should become the "Standard Fire Insurance Policy of the State of New York." Counsel for the defendant states in the points that coinsurance clauses, in effect the same as the one presented by the submission, were so filed pursuant to that statute. That fact is not stipulated, but counsel quotes the clauses and they sustain his claim and if necessary, doubtless, we could take judicial notice of the fact since they become part of the standard policy.

By section 121 of the Insurance Law of 1892 (Gen. Laws, chap. 38; Laws of 1892, chap. 690) it was provided that the printed blank form of a contract or policy of fire insurance "with such provisions, agreements or conditions as may be

indorsed thereon or added thereto and form a part of such contract or policy" theretofore filed in the office of the Secretary of State pursuant to the provisions of chapter 488 of the Laws of 1886 should be known and designated as the "standard fire insurance policy of the State of New York." The Legislature by chapter 429 of the Laws of 1887 ratified and confirmed the standard policy and special clauses filed pursuant to the act of 1886.

Section 121 of the Insurance Law, as amended by chapter 513 of the Laws of 1901, provided in part as follows:

"Standard fire insurance policy to be prescribed and used.—The printed blank form of a contract or policy of fire insurance, with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy, heretofore filed in the office of the Secretary of State by the Superintendent of Insurance or by the New York board of fire underwriters, pursuant to the provisions of chapter four hundred and eighty-eight of the laws of eighteen hundred and eighty-six shall be transferred by the Secretary of State to the office of the Superintendent of Insurance and, together with such provisions, agreements or conditions as may previous to the thirty-first day of December, nineteen hundred and one, be filed by the New York board of fire underwriters in the office of the Superintendent of Insurance and approved by him, which provisions, agreements or conditions shall be void if they are inconsistent with the standard fire insurance policy heretofore filed in the office of the Secretary of State, shall be known and designated as the 'standard fire insurance policy of the State of New York.' No fire insurance corporation, its officers or agents, shall make, issue or deliver for use, any fire insurance policy or the renewal of any such policy on property in this State, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with such printed blank form of contract or policy; and no other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or delivered therewith, except as follows, to wit: * * *

Second. Printed or written forms of description and specifica-

tion, or schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk not inconsistent with or a waiver of any of the conditions or provisions of the standard policy herein provided for."

These provisions were re-enacted without change, with the exception of slight changes in punctuation not materially affecting the construction, by the amendment made to section 121 by chapter 106 of the Laws of 1903, and by section 121 of the present Insurance Law (Consol. Laws, chap. 28; Laws of 1909, chap. 33), as amended by chapter 240 of the Laws of 1909, and by chapters 168, 638 and 668 of the Laws of 1910; and they were also re-enacted in the amendment made by chapter 181 of the Laws of 1913, but the words "previous to the thirty-first day of December, nineteen hundred and one," were omitted. That omission, however, has no material bearing on the point presented for decision by this submission.

Acting on the provisions of the section, as amended by said chapter 513 of the Laws of 1901, the blank form average clause, to which reference has been made, was filed in the office of the Superintendent of Insurance, and from the time it was so filed down to the present time it has been in use in the precise form in which it is found on the policy in question, as a rider in connection with the standard policy. After the amendment made by chapter 440 of the Laws of 1917, this blank form was refiled under the provisions of said amendment in precisely the same form, and approved by the Superintendent of Insurance on December 31, 1917.

The standard form in use prior to the amendment of 1917, exclusive of any authorized rider that might be agreed upon, contained in the body of the policy 112 numbered lines; and it was provided in lines 96 to 100, inclusive, as follows: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided

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for by agreement or condition written hereon or attached or appended hereto."

And it was further provided in line 113, as follows: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto."

It is to be borne in mind that during all the period from 1886 down to the time the form of the policy was changed by the amendment of 1917, the statute prohibited the indorsing on or adding to the standard form of policy of any provision, agreement or condition inconsistent with the provisions of the standard form of policy; and yet throughout that period said blank form of rider, specified thereon as such *average* clause but better known and generally referred to as a coinsurance clause, was in use.

By section 2 of chapter 440 of the Laws of 1917 section 121 of the Insurance Law, as theretofore amended, was repealed, and by section 3 thereof a new section 121 was added to take effect January 1, 1918, so as to provide with respect to the standard policy and clauses that may be added thereto as follows:

"The printed blank form of a contract or policy of fire insurance adopted by the National Convention of Insurance Commissioners at its meeting held in the city of New York on the twelfth day of December, nineteen hundred and sixteen, shall be filed by the Superintendent of Insurance in his office on the first day of January, nineteen hundred and eighteen, with the date of such filing indorsed thereon by him and shall be known and designated as the 'Standard fire insurance policy of the State of New York,' * * * and no other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or added thereto or delivered therewith, except as follows, to wit: * * *

"Third. There may be printed in the space indicated by the words 'space for description of property,' or added to the policy at such space by agreement in writing thereon or by rider attached thereto the following: * * * 2. The extent of the application of insurance under the policy; 3.

The extent of the contribution to be made under the policy in case of loss or damage; 4. Any other matter necessary clearly to express all the facts and conditions of insurance on any particular risk. Provided, however, that no such agreement or rider shall be inconsistent with or a waiver of any of the conditions or provisions of the standard fire insurance policy hereby established, * * *. Forms of riders, indorsements, clauses, permits, forms or other memoranda to be attached to and made a part of fire insurance contracts relating to property located in this State may be presented for filing in the office of the Superintendent of Insurance by any corporation, association or bureau maintained for the purpose of suggesting, approving or making rates to be used by more than one underwriter for insurances on property located in this State, and, when approved and filed by such Superintendent of Insurance, shall thereupon become standard forms of riders, indorsements, clauses, permits, forms or other memoranda and their use shall be required, as hereinbefore provided."

The policy described in the submission was the standard form referred to in the last amendment to the statute, and by it the numbered lines are transferred from the body to the back of the policy with some changes and are renumbered. By the policy, in so far as here material, the defendant insured the plaintiff to the extent of the actual cash value of the property therein described to an amount not exceeding \$100,000 from all direct loss or damage by fire. In the paragraph next to the last in the body of the policy it was provided that it was made and accepted subject to the preceding stipulations and conditions, "and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided." The conditions printed on the back of the policy are printed in fine print and the lines thereof are numbered consecutively from 1 to 200. Lines 72 to 77, inclusive, are as follows:

"ADDED CLAUSES. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or

provisions of this policy, may be provided for by agreement in writing added hereto."

Lines 101 to 105, inclusive, are as follows:

"PRO RATA LIABILITY. This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not."

It will be observed that the provisions contained in lines 101 to 105, inclusive, and the first three lines of the paragraph relating to "added clauses" of the new standard policy, are substantially the same as those theretofore contained in a single sentence in the former policy in lines 96 to 100, inclusive. The remaining provisions of the "added clauses" contained in lines 74 to 77, inclusive, to wit, "and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto," are the same, in substance, as the provisions of the former standard policy in line 113 herein quoted, with the additional provisions that any such further agreement to be added to the policy shall not be inconsistent with or a waiver of any of the conditions or provisions of the policy. Although the former standard policy contained no such provision on the subject of inconsistent agreements, it will be observed that at all times from the enactment of chapter 488 of the Laws of 1886 to the amendment of section 121 in 1917, the statute itself forbade the making of any special agreement inconsistent with the provisions of the standard policy. It is also to be noted that by the changes made in the standard policy in 1917, the provisions with respect to the *pro rata* liability of the insurer where there is more than one policy on the property, and the provisions relating to the extent of the application of insurance under the policy and the contribution to be made by the insurance company in case of loss or damage, which were embodied in the same sentence in the former standard policy, have been separated and the *pro rata* provisions are now preceded by the heading "Pro Rata Liability," and the others are preceded by the heading "Added Clauses," and they precede the provisions relating to *pro rata* liability. This change has a significant bearing on the point

as to whether, as contended by the plaintiff, the provisions with respect to the extent of the application of the insurance and with respect to the contribution to be made by the insurer relate *only* to the application of the insurance and to contribution *as between insurance companies and concerning their pro rata liability*. If that were their only purpose, it would seem that they would have been left, as before, together. On this point, we are informed by counsel for the defendant that no form of clause or rider for a special agreement with respect to the *pro rata* liability, apportionment or contribution as between insurance companies has ever been filed; and it is, therefore, contended, with much force, I think, that the provisions with respect to the extent of the apportionment of the insurance and of the contribution to be made by the insurer were intended and understood to apply, if not exclusively at least also, to other agreements than those relating to *pro rata* liability as between insurance companies. That this is so is, I think, demonstrated by the history of so-called coinsurance and by the opinions of the courts with respect thereto prior to the enactment of any of the statutes to which reference has been made and during the time that the statutes prior to the amendment of section 121 in 1917 were in force. Coinsurance in ordinary fire insurance policies is an application, in part, of the general rule in use for centuries with respect to marine insurance, under which the insured was deemed a coinsurer with respect to the excess in value of the property insured over and above the amount of insurance thereon, or in other words, that part of the risk not covered by the insurance policies and he was entitled to share to that extent in any salvage. (Winter Marine Ins. 164, 165; 2 Arnould Marine Ins. § 1215; 2 Parsons Marine Ins. 405; 2 Philips Ins. § 1435.) Webster's International Dictionary defines "co-insurance" as follows: "Co-insurance * * *, that system of fire insurance in which the insurer is treated as insuring himself to the extent of that part of the risk not covered by his policy, so that any loss is apportioned between him and the insurance company on the principle of average, as in marine insurance or between other insurers," and "co-insurance clause. Fire insurance" as "the clause in a policy of insurance which provides for the application of the coinsurance system in case of loss." We find that the courts in

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deciding cases involving coinsurance use the words "apportionment," "proportion" and "contribution," which are the words embodied in our statute and in the former and present standard form of policy, as applicable to that part of the insurance which, in such cases, the insurer himself is deemed to carry. (*Buse v. National Ben Franklin Insurance Co.*, 96 Misc. Rep. 229; *affd.*, without opinion, 177 App. Div. 948; 226 N. Y. 589; *Farmers' Feed Co. v. Scottish Union Insurance Co.*, 173 id. 241; *Chesbrough v. Home Ins. Co.*, 61 Mich. 333; 2 Arnould Marine Ins. § 1215.) It is manifest that the rates of insurance which it becomes necessary for insurance companies to charge depend upon the premiums received and losses sustained by them. To the end that insurance rates shall operate equitably, the Legislature has by section 65 of the Insurance Law (added by Laws of 1911, chap. 416, as amd. by Laws of 1918, chap. 141) provided against discrimination. It is important both to preserve the solvency of insurance companies and for the equitable application of the rates charged for insurance, that such rates shall be determined upon scientifically. Coinsurance clauses have frequently been declared to be just and reasonable and entirely consistent with the rule of indemnity, for they merely require the assured, as a condition of receiving a lower premium rate, to stand part of the loss himself, where he does not take out full insurance or insurance to the percentage of the value specified. (*Belt v. American Central Ins. Co.*, 29 App. Div. 546; *affd.*, 163 N. Y. 555; *Buse v. National Ben Franklin Insurance Co.*, *supra*; *Hartwig v. American Insurance Co.*, 169 App. Div. 60; *Christian & Daniel v. Niagara Fire Ins. Co.*, 101 Ala. 634; *Stephenson v. Agricultural Ins. Co.*, 116 Wis. 277; *Penn. Fire Insurance Co. v. Moore*, 51 S. W. Rep. 878; *Quinn v. Fire Assn.*, 180 Mass. 560; *Firemen's Fund Ins. Co. v. Pekor*, 106 Ga. 1; *Attorney-General v. Commissioner of Insurance*, 148 Mich. 566; *Ostrander Ins.* [2d ed.] § 208.) It might, I think, fairly be assumed from the extent to which coinsurance clauses were in use in this State that the Legislature was aware of their use prior to the amendment of section 121 in 1917, but it clearly appears that it was, for in 1911 the Merritt committee, so called, which was a joint legislative committee appointed in 1910, had those clauses under consideration and with respect thereto reported as follows:

“The general conclusions we reach with regard to the coinsurance clause are these: that the principle upon which it is founded, namely, that rates should be based upon the percentage of insurance carried, is not only sound but is absolutely requisite if the equities of the insured are to be preserved; second, that the coinsurance clause rightly recognizes that as a practical matter the responsibility for maintaining a given percentage of insurance must rest with the insured; third, that the operation of the agreement is automatic and fair.

“The objections that can be urged to the coinsurance clause are not on theoretical but on practical grounds and are entirely due to the fact that it is in use where it is not understood. It is perfectly true that the coinsurance clause is a dangerous thing for a person who does not understand it and for a person who does not keep close watch of his values,—not dangerous in the sense that the insured will not get what he ought to get, but in the sense that he will not get what he thinks he is going to get. But, should the government undertake to shield those who enter into a contract which they do not understand if this must be done at the expense of the real equities of the mass of the insured?

“The very purpose of the coinsurance clause is to place upon the insured the responsibility for ascertaining the value of his property, and for keeping it properly insured; and it goes without saying that, having assumed this responsibility, he must live up to it or he will be caught at a disadvantage.

“All that the insured needs to know, as a practical matter, is that in signing, say, an 80 per cent. coinsurance clause he agrees to keep at least 80 per cent. of the value of his property covered by insurance, and that in failing to do so he makes himself liable to the loss of part of his indemnity.” (N. Y. Assembly Documents, 134th Session, 1911, vol. 20, No. 30, pt. 1, pp. 89, 90.)

It thus appears by practical construction that for a period of some thirty years prior to 1917, it was deemed by the Legislature, by the Superintendent of Insurance, by insurance companies, by those desiring the lower rate obtainable by coinsurance, and by the courts, that coinsurance clauses were authorized; and since they could be valid only on the theory that they were not inconsistent with the provisions of the

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standard policy, it follows also that they were deemed to be consistent therewith. It is stated in the points for the defendant that in a few of our sister States coinsurance is prohibited by statute, and that in others it is expressly regulated by statute, and cases are cited which sustain the contention. In *Nelson v. Traders' Insurance Co.* (181 N. Y. 472) the court in sustaining as valid a clause added to the New York standard policy, to the effect that if a building in which the insured property was or any part thereof should fall, except as the result of a fire, the insurance on the building or its contents should immediately cease and in construing it as relieving the insurance company from liability for fire following immediately after the fall of the building, stated that the contract was one of indemnity against loss caused by fire and not against a loss "the proximate cause of which was in the working of some other agency;" and in holding that it was competent for the parties to agree that the company should not be liable for a loss from fire after the fall of the building, said: "It is quite competent, in so far as the provisions of a policy are concerned, to modify, or to restrict them, or to describe more particularly the actual risk assumed, by a written indorsement upon the instrument. The Legislature left the parties free in that respect and it would have been competent for them to do so in this case, if the intention had been to insure the plaintiffs' premises as an independent, or separate, structure. As it is, this clause of the contract is plain; it is not unreasonable as a limitation of the insurance hazard and, unless the court is to make a new agreement between the parties, it should be enforced." It would seem, in the circumstances, that if the Legislature intended to limit the freedom of contract which it had theretofore sanctioned and acquiesced in, and to prohibit such agreements for average or coinsurance, there would have been embodied in the statute or in the standard policy some provision clearly expressing or manifesting such intent (See *Firemen's Fund Ins. Co. v. Pekor*, *supra*; *Woolcott v. Shubert*, 217 N. Y. 212), but I find none. Plaintiff was at liberty under this clause to take out such insurance as would afford him full indemnity in case of a loss, but he evidently preferred not to pay the additional premium incident thereto and he thereby elected to become a coinsurer, so far

as the defendant is concerned, to the extent of the loss, which it refused to pay and which he now seeks to recover. Since the amendment of the statute and the changes in the standard form of policy in 1917, the Appellate Term in *Durham v. Stuyvesant Insurance Co.* (112 Misc. Rep. 440) decided that an agreement for coinsurance is inconsistent with the provisions of the standard policy and, therefore, void. I am unable to agree with that decision for the reasons herein stated.

It follows that the defendant is entitled to judgment on the submission but, pursuant to the stipulation, without costs.

CLARKE, P. J., SMITH and MERRELL, JJ., concur; PAGE, J., dissents.

Judgment ordered for defendant, without costs. Settle order on notice.

DANIEL D. STEINBECK, as Executor of JOHN H. STEINBECK,
Deceased, Respondent, v. EDITH HELENA, Appellant.

Second Department, January 14, 1921.

Easements—when right to have and maintain water pipe from spring does not pass by deed as appurtenance—when implied easement does not survive full covenant warranty deed.

In an action wherein the question involved was the right of the plaintiff to have and maintain a water pipe underground from a spring on the defendant's premises to the plaintiff's house it appeared that originally the two properties had been one farm and that a pipe had been run underground from a spring on property now owned by the defendant to the barns on that property and thence across the highway to the house; that the owner devised the farm to his two sons, one of whom was the plaintiff's testator, excepting the house and curtilage, which was devised to the widow for life; that the two sons divided the farm with the exception of the house, and the plaintiff's testator took a quitclaim deed for that part of the farm on the house side of the road and gave a similar deed to his brother of the property on the opposite side of the road; that on the death of the widow the plaintiff's testator received a deed of the house and curtilage; that in none of the deeds was any mention made of the pipe or spring; that the defendant thereafter acquired the property on which the spring was located by a warranty deed without any reservation as to the pipe or spring, and that although the house had been sup-

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plied with water from the spring for a great many years the defendant had no knowledge that the water came from her premises.

Held, that the right to have and maintain the pipe from defendant's spring to plaintiff's house did not pass under the deed from the plaintiff's brother to the plaintiff as an appurtenance.

There is no implied easement in favor of the plaintiff to have and maintain the pipe which survived the full covenant and warranty deed to the defendant, for the reason that when she took that deed the existence of the alleged easement was not open and visible upon the premises which she purchased and which were conveyed to her and was not known to her at the time she took title.

APPEAL by the defendant, Edith Helena, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Putnam on the 10th day of January, 1920, upon the decision of the court rendered after a trial at the Putnam Special Term.

Alfred A. Wheat [*Clayton Ryder* with him on the brief], for the appellant.

Ray F. Barnum [*Frederic S. Barnum* with him on the brief], for the respondent.

MILLS, J.:

There is no dispute as to the facts, and they are the following, as stated in the decision:

About December, 1894, Daniel D. Steinbeck, Sr., died at said town, being the owner of a farm of land therein containing about 270 acres, which was divided into two portions by a highway, with a barn upon one side of the road and a house upon the other, which used to be a common arrangement in farm property. He left him surviving two sons and a widow. He left a will by which he gave to the two sons the farm except that he gave to the widow the use for her life of the house and the lot containing about three-quarters of an acre upon which the house stood. At the time of his death and for many years before, there was a pipe leading from a spring on the barn side of the road to a tub at the barn and thence under the road to some receptacle in the house, such pipe being altogether under ground; and by it both the barn and the house were supplied with water.

In 1895 the sons divided between them the farm by each

giving to the other a quitclaim deed of his portion except the said house and lot. By that division Millard became the sole owner of the portion of the farm on the barn side of the road and John the sole owner of the other part of the farm except the house and lot. The widow continued to reside in the house until her death in 1900. Thereafter in that year the two sons, who had become by her death the sole owners of the house and lot, offered it for sale at public auction and John purchased it for the sum of \$1,500. Whereupon Millard gave to John a quitclaim deed of his interest in the house and lot which was duly recorded on February 27, 1901. In July, 1911, Millard sold and conveyed by deed dated July 11, 1911, his portion of the farm to defendant. Up to and after the time of the conveyance to the defendant the pipe continued to be located as above stated and both house and barn continued to be supplied with water through it as above stated. In the year 1914 defendant cut off the part of the pipe which went from her premises across the road and thus stopped entirely the flow of water from the spring to the premises of John, and this action was thereafter commenced. John died pending the action and his executor was substituted as plaintiff.

Defendant testified that when she purchased the property she had no notice whatever that there was any pipe or any connection from her land to the house. I find in the record no evidence contradicting her testimony in this respect. It is plain that the pipe to plaintiff's house from the locality of the tub at the barn on defendant's land was entirely underground without any evidence of its existence visible upon defendant's premises; and that much the plaintiff at the trial admitted. The learned trial justice found that such use of the water at the house was "open, visible and notorious" for sixty years prior to defendant's cutting off the pipe as aforesaid, and he refused defendant's contrary request. Upon the evidence it is plain that such user had been open and visible only upon the plaintiff's premises, that is, at the house.

The contention of the appellant here is that the right to have and maintain the pipe from defendant's spring to plaintiff's house did not pass under the deed of Millard to John as an appurtenance. It should have been stated before that

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not one of the deeds contains any reference to the spring or pipe or use of the water. This claim of the appellant appears to be sustained by the case of *Root v. Wadhams* (107 N. Y. 384, 394). Appellant further contends that there is no implied easement in favor of the plaintiff to have and maintain that pipe which survived the full covenant warranty deed to the defendant, for the reason that when she took that deed the existence of the alleged easement was not open and visible upon the premises which she purchased and which were conveyed to her.

This claim also seems to me to be sustained by the authorities cited in his brief by the learned counsel for the appellant. (*Butterworth v. Crawford*, 46 N. Y. 349, and *Treadwell v. Inslee*, 120 id. 458.) He contends that the vital point in those decisions was that the alleged easement was not visible and notorious. The learned counsel for the respondent attempts to discriminate the instant case from those, because in them the first conveyance by the common owner was of the servient tenement. That, however, is practically the situation here, because under the will of the father the sons John and Millard were the owners of the entire farm and upon his death entitled to immediate possession of all of it except that the widow had a life estate in the house. They owned that subject to that life estate, and in that situation they in 1895 conveyed the alleged servient tenement to Millard without any reservation of the alleged easement. After the mother's death in 1900 Millard quitclaimed to John his interest in the house and lot. The servient tenement thus was first severed and conveyed.

I agree with the counsel for the appellant, however, that the controlling point in the authorities is the fact that the alleged easement was not open and visible and was not known to the defendant when she took her title to the alleged servient tenement.

Hence, I conclude that the decision in the instant case is mistaken and that the judgment should be reversed. As it does not seem possible that upon a new trial evidence may be adduced to show actual notice to the defendant when she purchased, I conclude that a new trial should not be granted.

Therefore, I advise that the judgment appealed from be

reversed, with costs, upon the ground that we consider that the findings Nos. 8 and 10, that the alleged easement was open, visible and notorious when defendant purchased and took her title, were against the weight of the evidence and that defendant's proposed findings Nos. 9, 10, 11, 12, 13 and 14 should have been allowed and found as being required by the weight of the evidence. Therefore, we should reverse said findings Nos. 8 and 10 and make defendant's said proposed findings Nos. 9, 10, 11, 12, 13 and 14, and award judgment to defendant dismissing the complaint upon the merits, with costs.

JENKS, P. J., RICH, BLACKMAR and JAYCOX, JJ., concur.

Judgment reversed, with costs. Findings Nos. 8 and 10 in the decision reversed, and defendant's proposed findings Nos. 9, 10, 11, 12, 13 and 14 are found, and judgment is granted to the defendant dismissing the complaint on the merits, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MOREWOOD REALTY HOLDING COMPANY, Respondent, v. JACOB A. CANTOR and Others, as Commissioners of Taxes and Assessments of the City of New York, Constituting the Board of Taxes and Assessments of the City of New York, Appellants.

First Department, February 4, 1921.

Taxation — assessment — resolution of board of assessors of city of New York reducing assessment may not be disregarded by new board although assessment roll not changed — Greater New York charter, section 898, construed.

The board of assessors of the city of New York, although clothed with power to continue any proceedings instituted by a prior board, has no authority to disregard a resolution of such prior board entered in its minutes reducing an assessment and to confirm said assessment as originally made, although the figures on the assessment roll were not in fact changed.

Section 898 of the Greater New York charter, requiring the decision of the tax board in an application for revision to be filed within thirty days after the close of the hearing, is doubtless directory merely, and the

failure to determine an application within thirty days does not leave the board without power to act, and determinations thereafter made are of like force and effect as if made within the thirty days specified in the statute.

APPEAL by the defendants, Jacob A. Cantor and others, as commissioners, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of April, 1920, directing that the assessment on 261-267 Amsterdam avenue, block No. 1144, lot No. 1, for the year 1918, of \$1,000,000, be reduced to and confirmed at the sum of \$975,000.

William H. King of counsel [*R. M. de Acosta* and *Charles E. Lalanne* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellants.

Alexander L. Strouse of counsel [*Clarence M. Lewis* with him on the brief; *Seligsberg, Lewis & Strouse*, attorneys], for the respondent.

SMITH, J.:

The relator duly filed its objections to the assessment for overvaluation. A hearing was had before the assessors and upon December 14, 1917, a resolution was passed and entered in their minutes reducing the assessment. The figures upon the assessment roll itself were not in fact changed. Upon January first a new tax board came into office and upon January thirty-first they assumed to confirm the assessment as originally made disregarding the action of the prior tax board upon December fourteenth. The relator thereupon brought this proceeding to have the valuation of its property reduced as provided in the resolution of the first tax board upon December fourteenth. By the determination from which this appeal is taken the assessment of the relator's property was thus corrected.

The determination must be confirmed. When the first board of assessors acted upon the relator's application and passed the resolution reducing the assessment they acted judicially. The entry of the passage of the resolution, in their minutes, was the record of their judicial determination. They had no power thereafter, even if they had continued in

office, to reconsider or make any other determination. Their power is limited by the statute and when once exercised in the form of a judicial determination it ends. It would follow that the old board would not have the right to reconsider any determination made by it upon December fourteenth. We will assume that the new board is a continuing board with power to continue any proceedings instituted before the first board. Nevertheless, it was without power to change the determination which had been so recorded.

In the brief of the corporation counsel reference is made to an extract from the opinion in the case of *People ex rel. Chamberlain v. Forrest* (96 N. Y. 544) in which it is said: "The assessors speak to the taxpayers through their completed rolls. Those, and those only, register their judgments." In that case, however, the court was considering the then existing State Tax Law and the completed roll there referred to was a roll completed before opportunity was given to the taxpayer to present grievances. It cannot be interpreted as holding that an actual change of the figures upon the assessment roll is necessary to effectuate the judicial determination made by the passage and recording of the resolution reducing the relator's assessment.

In support of the determination appealed from attention is called to section 898 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1911, chap. 455) which requires the decision of the tax board in an application for revision to be filed within thirty days after the close of the hearing. That requirement is without doubt directory merely, and a failure to determine an application within the thirty days does not leave the board without power to act and determinations thereafter made are made with like force and effect as if made within the thirty days specified in the statute.

The order should, therefore, be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ.,
concur.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARLOEW AMUSEMENT COMPANY, Respondent, v. JACOB A. CANTOR and Others, as Commissioners of Taxes and Assessments of the City of New York, Appellants. (Taxes of 1918.)

First Department, February 4, 1921.

See head note in *People ex rel. Morewood Realty Holding Co. v. Cantor* (ante, p. 190).

APPEAL by the defendants, Jacob A. Cantor and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of May, 1920, reducing the assessment on lot No. 17, block 1931, section 7, on the assessment roll of the borough of Manhattan for the year 1918 from the sum of \$435,000 to the sum of \$233,000.

William H. King of counsel [*R. M. de Acosta* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellants.

James M. Vincent of counsel [*Curtis A. Peters* with him on the brief], for the respondent.

SMITH, J.:

For the reasons stated in the opinion in *People ex rel. Morewood Realty Holding Co. v. Cantor* (195 App. Div. 190), handed down herewith, the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, PAGE and GREENBAUM, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of ADOLPH M. SCHWARZ, an Attorney,
Respondent.

First Department, February 11, 1921.

Attorney at law disbarred — professional misconduct — soliciting business by circular letters containing false statements — disregard of censure and warning by court.

Attorney at law disbarred for violation of professional ethics, in that he continued falsely to advertise himself as an attorney admitted to practice law in other States, and to solicit business by sending broadcast circular letters, after being censured and warned by the court on a former complaint and permitted to continue the practice of law on promise to refrain from using unprofessional methods.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York.

Einar Chrystie, for the petitioner.

Francis L. Wellman of counsel [*Herbert C. Smyth* with him on the brief; *Wellman, Smyth & Scofield*, attorneys], for the respondent.

CLARKE, P. J.:

The respondent was admitted to the bar in October, 1905, at a term of the Appellate Division, Second Department, and was practicing in the First Judicial District at the time he committed the acts complained of.

The petition alleges that the respondent heretofore in 1916 was proceeded against in a proceeding in the Appellate Division in the First Department in which he was charged with misconduct by reason of the methods employed by him in soliciting business and sending out letters, circulars and advertisements claimed to be improper; that the court in its decision expressed its emphatic disapproval of the respondent's methods and censured him severely therefor. The court also stated that upon respondent's refraining from further use of such methods no further action would be taken against him and warned the bar that such conduct would not be tolerated and a repetition thereof would lead to disbarment; that the respondent has failed to obey the directions of the court and has continued

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to solicit business by means of circular letters sent out in large quantities. The following is a copy of one of these circular letters:

"ADOLPH M. SCHWARZ,

"ATTORNEY AND COUNSELOR AT LAW.

"299 Broadway, New York.

"Boston

"Kimball Building

"Philadelphia

"Land Title Building

"Pittsburg

"Frick Building

"Private Office

"New York City.

Chicago

First Nat'l Bank Bldg.

Cleveland

Leader Building

Detroit

Dime Bank Building

December Twenty-Second

Nineteen Nineteen

"GENTLEMEN.—My records disclose that I have not received any items of business from you for some time. I want to ask you — why? Is there a reason? Please be *frank with me* and tell me. I want to correct any misunderstanding that may have arisen between your good office and mine.

"The Collection Department, City and Out-of-town, is now in charge of one of the *best collection men* in the country, an attorney and former credit-man, thorough and painstaking in the minutest detail, with ability to get results, no matter how small or large the account or where the debtor may be located.

"In all offices I maintain a staff of experienced and able attorneys. In my New York office alone I have my own permanent corps of lawyers, able practitioners, members of the New York, New Jersey, Massachusetts, Ohio and Illinois Bars, whose knowledge and experience in the Laws and Practice of these States should be of material benefit to you. Their professional services are always available.

"In this period of readjustment coupled with its abnormal conditions eating into the vitals of our energies and profits, now is the most propitious time to clean up your books. If you have any bad or doubtful accounts, you should know it before your Income Tax return is due, so as to avoid paying taxes on merely book profits which in reality may prove only losses. Go over your books; get up a list of delinquent accounts; send them in; or if you prefer, telephone 3466

Worth and ask for extension 2, *Mr. Pugh*; or for extension 4, *Mr. Thomas*, and either will call on you in connection with them.

"Owing to our heretofore existing mutually profitable and what I always considered pleasant relations, it is no presumption for me to expect to receive from you the courtesy of an *early, specific and favorable reply* with some items enclosed or advices when I may expect to receive them, and with *best wishes* for Nineteen Twenty, I remain

"Sincerely yours,

"AMS-2

(signed) A. M. SCHWARZ."

Charge 2. The respondent during the past two or three years has used and is now using printed or engraved letter-heads, cards and other stationery of which the following is a copy:

"ADOLPH M. SCHWARZ,

"ATTORNEY AND COUNSELOR AT LAW.

"299 Broadway, New York.

"Boston

"Kimball Building

"Philadelphia

"Land Title Building

"Pittsburg

"Frick Building

"Private Office."

Chicago

First Nat'l Bank Bldg.

Cleveland

Leader Building

Detroit

Dime Bank Building

That the respondent, some time prior to July, 1917, applied for admission to the bar of the State of Michigan and the State Board of Law Examiners of that State refused to recommend him to the Supreme Court for admission and he has never been admitted and is not now admitted to the bar or entitled to practice as an attorney and counselor at law in that State; that the respondent has never been admitted to the Bar of the State of Pennsylvania and is not now and never was admitted to practice as an attorney and counselor at law in that State; that the respondent by the use of these letter-heads, cards and stationery has falsely represented to numerous persons and corporations that he is an attorney and counselor at law, entitled to practice as such in the States of Michigan

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and Pennsylvania and has law offices in the cities of Detroit, Philadelphia and Pittsburg in said states.

It appears from the record before us, and the respondent admits, that he sent out some 4,500 copies of the letter set forth in the petition. He claims that said letters were sent only to former clients of his and that he is in no way censurable for so doing. In the first place the letter plainly in its heading holds out to its recipients that the respondent is an attorney and counselor at law and practicing as such in the State of Pennsylvania, where he has offices in Philadelphia and Pittsburg, and in the State of Michigan, where he has an office in Detroit. He is not a member of the bar of either of those States and the heading contains a palpable *suggestio falsi*. It should be noted further that there is nothing in the heading that suggests a business occupation or a collection agency, but it plainly sets forth that it is issued from the private office of an attorney and counselor at law. The letter speaks for itself. It is obviously a self-laudatory solicitation for employment for professional services. It can only be properly characterized as a wholesale circularization for the purpose of obtaining business. When this respondent and his self-advertising methods were before this court before, we said (in 175 App. Div. 335) of the letters, circulars and advertisements then submitted for our inspection: "They are typical of modern advertising business methods and would be appropriate to the exploitation of patent medicines or other proprietary articles, but are utterly abhorrent to professional notions or standards. Unless the ancient and honorable profession of the law, whose practitioners are officers of the court of the highest fiduciary character, under obligations of service to the State, to the community and to the court, is to be degraded to the rank of a quack medicine business enterprise, the advertising and business solicitation methods here under review must be emphatically and absolutely condemned."

We said again: "The court has no disciplinary supervision of business enterprises. It has jurisdiction over its own officers and is authorized to discipline any attorney who is guilty of professional misconduct. We are of the opinion that by using the methods, letters, circulars and advertisements here under consideration the respondent is guilty of professional

misconduct. If respondent wishes to retain and carry on the business which he claims is so valuable to him, he may do so outside of the profession whose standards and rules of conduct he has violated; he cannot remain a member of the Bar of this State and, while such member, indulge in such practices."

One member of the court voted at that time for the respondent's disbarment, but the majority of the court, in view of representations made by the respondent that he would cheerfully accept and abide by the rule of guidance laid down by the court, contented themselves with administering a severe censure with a statement that upon his refraining from further use of such methods no further action would be taken, but added, "Respondent and the bar generally are warned that such conduct is not to be tolerated, and repetition thereof will lead to disbarment."

The respondent was again before this court in a summary proceeding. In *Matter of Rowe Co., Inc.* (191 App. Div. 179) we affirmed an order denying a motion to compel him as an attorney to pay over certain moneys which had been collected by him as a collection agent in Pittsburg, Penn., upon the ground that as the acts complained of had not been committed in this State or as an attorney the court was without jurisdiction to proceed summarily, but we said: "We think this record discloses matters, however, which should be the subject of investigation. Respondent is an attorney in this State. He uses a letterhead, quoted above, which is calculated to create the impression that he maintains other offices as an attorney in the cities therein enumerated at the places designated. He has no office as an attorney at the Frick Building in Pittsburg, Penn., and he is not authorized to practice law in that State. What he maintains there is only a collection agency. An attorney has no right to use a deceptive and misleading caption on his office stationery, intended to obtain business upon the faith of his professional character, when in fact he cannot act in such a capacity in at least one of the localities listed. It would be a fraud upon the public to allow an attorney to induce the placing of matters in his hands by a representation that he was an attorney practicing in various States and then have him resist the enforcement of the usual remedies applicable to the protection of a client's rights, upon

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the ground that he was not qualified as an attorney in the State where a collection was to be made and, therefore, could not be held to the strict accountability incident to the professional relationship."

In the matter at bar we agree with the learned official referee who said that after due consideration he could not "avoid the conclusion that the respondent's conduct did constitute such professional misconduct, * * * I cannot believe that by the adoption of Canon 27 of the Canons of Ethics it was intended to permit such energetic and persistent appeals accompanied by self laudatory statements as the circulars disclose. The circular, Exhibit 3, is to my mind as typical of modern advertising business methods and as abhorrent to professional notions or standards as were the advertisements considered by this court in its opinion in 175 App. Div. 335, particularly when we consider that respondent thereby circularized about 4,500 persons."

The respondent again expresses his desire to abide by any direction the court may see fit to make herein. The warning heretofore administered, however, was too emphatic to admit of misinterpretation. It is evident that the respondent has no conception of the ethics of the profession and is obsessed by the notion that self-advertisement is a proper means of obtaining professional employment and that his efforts are directed to so shaping his letters and circulars as to obtain the results of such advertisement and at the same time escape judicial condemnation. He had fair warning but has deliberately violated the spirit of our former decision while asserting that he has observed its letter. The court told him plainly that if he wished to continue his business, for that is what he then claimed it was, in the manner and by the methods employed, he must do it as a business man and not masquerade as a professional man while violating the fundamental ideals and principles of the profession.

As he has not heeded the sharp warning there given, he is disbarred.

LAUGHLIN, DOWLING, MERRELL and GREFNBAUM, JJ.,
concur.

Respondent disbarred. Settle order on notice.

GEORGE E. TURNURE and Others, Copartners Doing Business under the Firm Name and Style of LAWRENCE TURNURE & COMPANY, Appellants, v. CHARLOTTE G. BREITUNG and Others, Copartners Doing Business under the Firm Name and Style of BREITUNG & COMPANY, Respondents.

First Department, February 11, 1921.

Evidence—forgery of acceptance of draft—admissibility of expert evidence—standards for comparison of handwriting—disputed “signatures”—Code of Civil Procedure, section 961d, construed.

In an action to recover upon a draft claimed to have been drawn upon the defendants by one H., payable to the order of himself, accepted by the defendants by one B., and thereafter indorsed and delivered to plaintiffs by H., before maturity for value, it was contended that the acceptance by B. was forged. To prove the forgery defendants relied upon the testimony of a handwriting expert who based his opinion on a comparison of the signature on the draft with three classes of signatures, viz.: (1) Specimen signatures of B., testified by him to have been written by him; (2) specimen signatures of H. and writings, testified by witness for plaintiff as being the signatures and writings of H.; and (3) specimen signatures of B., testified to by him as not having been written by himself, but testified to by the defendants' expert as, in his opinion, after comparison thereof with specimens (1) and (2); to have been written by H.

Held, that specimen signatures and writings (1) and (2), having been properly proved by common-law evidence to have been written by the respective parties, were admissible as standards for the purpose of comparison by the handwriting expert, under section 961d of the Code of Civil Procedure.

However, as specimen signatures (3), testified to by B. as not having been written by himself, were not proved by common-law evidence to have been written by H., but were merely testified to by defendants' expert as, in his opinion, to have been written by H., they were for this reason inadmissible, as not only introducing into the case a collateral issue but also using as a standard for determining the authenticity of a disputed signature specimens of handwriting not proved by common-law evidence.

Where, in an action involving the forgery of a signature to a draft, a handwriting expert relies very largely on a comparison of an alleged forged signature with disputed standards, giving little testimony as to reliance on properly proved standards, and admits that if it were not for the disputed standards it would be difficult to prove a forgery, it cannot be said that the admission of such latter standards did not constitute reversible error.

APPEAL by the plaintiffs, George E. Turnure and others, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 28th day of February, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the 2d day of March, 1920, denying plaintiffs' motion to set aside the verdict and for a new trial made upon the minutes.

Nathan F. George of counsel [*Forsyth Wickes*, attorney], for the appellants.

Samuel Seabury of counsel [*Otto C. Sommerich* with him on the brief; *Katz & Sommerich*, attorneys], for the respondents.

CLARKE, P. J.:

The plaintiffs sued upon a draft which they claim was drawn May 28, 1919, upon the defendants, respondents, by one Mariano Herrera, payable to the order of himself, ninety days after date, accepted by the defendants and indorsed and delivered by said Mariano Herrera to the plaintiffs, the holders thereof, before maturity for value. Respondents claimed that the signature "E. N. Breitung," on the draft, by which signature the draft purported to be accepted by them, was not written by the respondent Edward N. Breitung but was forged by said Mariano Herrera. To prove the forgery claimed respondents relied upon the testimony of a handwriting expert who based his opinion that the signature "E. H. Breitung" on the draft in suit was a forgery and was forged by Mariano Herrera upon a comparison of said signature with three classes of so-called standards as follows:

(1) Specimen signatures "E. N. Breitung" testified to by Edward N. Breitung as having been written by him.

(2) Specimen signatures "Mariano Herrera" and writings testified to by witness for plaintiff as being the signatures and writing of Mariano Herrera.

(3) Specimen signatures "E. N. Breitung" testified to by Edward N. Breitung as not having been written by himself and testified to by respondents' expert as, in his opinion, after a comparison thereof with specimens (1) and (2), to have been written by Mariano Herrera.

The appellants strongly object to the admission of (3) the

so-called "disputed" signatures of E. N. Breitung as standards of forgeries by Mariano Herrera, and, it is upon the exception taken to the admission in evidence of these signatures as standards of forgeries by Herrera that the appellants urge their appeal.

Section 961d of the Code of Civil Procedure provides that "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner." The question presented being whether Breitung or Herrera signed the acceptance of the draft in suit, it is clear that specimen signatures of E. N. Breitung, properly proved by common-law evidence to have been written by him, and specimen signatures of Mariano Herrera, properly proved by common-law evidence to have been written by him, were admissible in evidence as standards for the purpose of comparison by a handwriting expert to determine whether the signature upon the draft in question was, as a matter of fact, though purporting to be written by Breitung, written by him or by Herrera. In each case these standards were proved to the satisfaction of the court to be the genuine handwriting of the person claimed on the trial to have made or executed the disputed instrument or writing, to wit, the draft sued upon, and were properly admitted in evidence. But the specimens known as Exhibits "F" and "G" "E. N. Breitung," while testified to by Edward N. Breitung as not having been written by himself, were not proved by common-law evidence to have been written by Herrera, but were testified to by the respondents' expert as, *in his opinion*, after a comparison with the proven signatures of both Breitung and Herrera to have been written by Herrera. This was not only to introduce a collateral issue into the case, but also to use as a standard for the purpose of determining the authenticity of the disputed signature in suit, to wit, that upon the draft, specimens of handwriting not proved by common-law evidence to have been the handwriting of the person claimed to have written it, namely, Herrera, but dependent solely upon the opinion of an expert witness that it was his handwriting.

In *University of Illinois v. Spalding* (71 N. H. 163) the court said: "The whole doctrine of comparison pre-supposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison in any proper sense. When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not; but when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous and more likely to bewilder than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard; and the proof upon this inquiry would be comparison again, which would only lead to an endless series of issues, each more unsatisfactory than the first; and the case would thus be filled with issues aside from the real question before the jury."

In *People v. Molineux* (168 N. Y. 264, 327) Judge WERNER said: "The third objection made by the defendant to the standards of comparison adopted at the trial is to the admission of the 'Barnet' letters and 'Cornish' letters. The 'Barnet' letters were undoubtedly admitted in the first instance to support the charge that the defendant had killed Barnet, and the 'Cornish' letters to sustain the charge that he murdered Mrs. Adams. Both were subsequently treated as evidence tending to connect the defendant with each of the crimes said to have been committed by him. All of these letters were also used as standards of comparison from which to determine who wrote the poison package address. They may, therefore, be considered together for the purpose of review under this head. The statutes of 1880 and 1888* provide that the comparison of a disputed writing may be made with *any* writing proved to the satisfaction of the court to be genuine. The words 'proved to the satisfaction of the court' are to be construed in the light of the obvious purpose for which these statutes were enacted. At common law a paper properly in evidence for general purposes can be com-

* See Laws of 1880, chap. 36, as amd. by Laws of 1888, chap. 555; now Code Civ. Proc. § 961d, as added by Laws of 1909, chap. 65.— [REp.]

pared with a disputed writing, but only when the genuineness of the handwriting of the former is admitted or proved beyond a reasonable doubt. [Citing cases.] Since these statutes were designed to amplify and broaden the common-law rule by permitting the use of genuine writings as standards of comparison, even when they are not competent or relevant for other purposes, it must be assumed that the language prescribing the manner in which the genuineness of such writings is to be established was carefully and deliberately chosen by the Legislature. While it is obvious that the words 'proved to the satisfaction of the court' do not invest the trial court with a mere personal discretion which is to be exercised without reference to rules of evidence, it is equally plain that the failure of these statutes to prescribe the precise method or degree of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed writing renders it necessary to resort to the general rules of the common law for that purpose. Thus the genuineness of a writing may be established (1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns.

"Since common-law evidence is competent to establish the genuineness of a writing sought to be used as a standard of comparison, it is apparent, in the absence of a statutory rule as to the degree of proof to be made, that the general rule of the common law as to the sufficiency of evidence must prevail. In civil cases the genuineness of such a paper must be established by a fair preponderance of the evidence and in criminal cases beyond a reasonable doubt. Writings proved to the satisfaction of the court by the methods and under the rules adverted to, may be used as standards for purposes

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of comparison with a disputed writing, subject, however, to the qualification that writings which are otherwise incompetent, should never be received in evidence for purposes of comparison."

In *People v. Corey* (148 N. Y. 487) the court said: "The effect of the statute which permits the introduction on a trial of other writings for the purpose of comparison is to permit the admission in evidence of only such writings as have been proved to the satisfaction of the court to be in the genuine handwriting of the person claimed to have executed the disputed instrument (Laws 1880, ch. 36, as amended by Laws 1888, ch. 555). An examination of the record in this case discloses that the court admitted this testament, not as the genuine handwriting of the defendant, but as his handwriting alleged to be genuine. Until its genuineness was established to the entire satisfaction of the court it was not admissible for the purpose of comparison."

Clark v. Douglass (5 App. Div. 547) was an action to recover on a note against the indorsers thereof. The defense was forgery. To prove the indorsements genuine the trial judge allowed certain signatures in evidence as standards of the alleged indorsers' handwriting. These standards were sought to be proved genuine by the same witness who testified that the indorsements themselves were genuine. An expert witness then compared the indorsements with the standards and pronounced the indorsements genuine. It was objected that the standards were not sufficiently proven. The court said: "The absurdity of allowing a signature claimed to be a forgery to be compared with another which is also claimed to be a forgery, and concerning the genuineness of which there is considerable doubt, is apparent. And it seems clear that whatever may be the character of the proof used, it should be such as fairly establishes the genuineness of the standard offered. Without intending to lay down any inflexible rule, we are of the opinion that unless the evidence of the genuineness of the standard is so clear that if it were one of the issues in the case for the jury to determine a verdict should be directed in favor of its genuineness by the court, it may not properly be allowed in evidence." It also said: "Here, then, is a case where there is as much doubt about the genuineness of

the standards as there is about the genuineness of indorsements; yet * * * they [the standards] are received by the court as genuine, and the jury are practically told that if the indorsements were written by the same hand that wrote the standards they are the genuine indorsements * * *."

It seems to me from an examination of the record that as it appears the expert's testimony shows that he relied very largely on a comparison of the draft in suit with the disputed standards, as he gave very little testimony of a comparison of the draft with the Herrera standards, and as he said that without the disputed standards it would be very difficult to prove a forgery, and as the trial judge in his charge allowed the jury to use all these standards freely as they saw fit in order to arrive at the question of forgery, we are forced to the same conclusion as was the court in *Clark v. Douglass* (*supra*) where it said: "In the case before us, the trial court, against the weight of evidence, adopted the standards as genuine. The question for the jury was, therefore, practically narrowed down to whether the same hand wrote both the signature on the standards and the indorsements; and if, from the testimony of the expert or from their own inspection and comparison they concluded that it did, a verdict was forced against the appellants upon very insufficient evidence. It is true that there was another standard used by the expert and the jury that was conceded to be the genuine signature of Smith, but this does not cure the error or relieve the case from the effect which the use of the other standard must necessarily have had upon the verdict. It seems clear that from such an error great prejudice was likely to result to the appellants, and for that reason we conclude that a new trial should be granted."

In the case at bar a very close and difficult issue was presented. Mr. Breitung himself was in doubt as to whether certain of the signatures purporting to have been made by him were as a matter of fact written by him. We are satisfied that the so-called disputed standards "F" and "G" were improperly admitted into evidence as standards in view of the fact that they were not properly proved to be the handwriting of Herrera, who was claimed to be the writer of the alleged fraudulent acceptance upon the draft in suit. It is

impossible to say that the erroneous admission of this evidence did no harm to the appellants.

It follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellants to abide the event.

LAUGHLIN, SMITH, PAGE and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellants to abide event.

GEORGE BOIKO & Co., INC., Respondent, v. ATLANTIC WOOLEN MILLS, INC., Appellant.

First Department, February 11, 1921.

Sales — when title passes where goods exist at time of contract and no place of delivery is mentioned — action for purchase price — when title to unascertained goods passes — appropriation of such goods to contract with implied consent of purchaser.

Where two bales of overcoat clippings were already made up and in a deliverable state at the time defendant placed a written order therefor, and a bale of worsted clippings was in existence and only required sorting to separate different grades and colors, title to the three bales passed when the worsted clippings were sorted, made into a bale and put in deliverable shape, and the three bales were set aside and tagged. Thereafter, under section 144 of the Personal Property Law, the seller could maintain an action for the purchase price if the purchaser wrongfully refused or failed to pay.

When no place of delivery is specified in the contract of purchase or sale of goods, the place of delivery is the seller's place of business.

Even though the transaction be regarded as a contract for the sale of unascertained goods, in so far as the bale of worsted clippings was concerned, title would pass when the bale was made up, tagged and put aside, in a deliverable state awaiting defendant's removal of the same, as such act would constitute an unconditional appropriation of these goods to the contract with the implied consent of the purchaser.

In such case defendant's consent to the appropriation of the goods to the contract may be implied by sending a truckman for the goods, and also by not claiming the right to make the selection or to inspect the goods after selection.

SMITH and DOWLING, JJ., dissent, with opinion.

APPEAL by the defendant, Atlantic Woolen Mills, Inc., from an order and determination of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of said Appellate Term on the 29th day of March, 1920, affirming a judgment of the City Court of the City of New York in favor of the plaintiff, and an order denying defendant's motion for a new trial.

Meyer Boskey of counsel [*Wise & Seligsberg*, attorneys], for the appellant.

George W. Glaze of counsel [*Glaze & Fine*, attorneys], for the respondent.

PAGE, J.:

The plaintiff was engaged in the business of buying and selling woolen rags. The defendant was manufacturing shoddy for woolen mills, having its mill at Dryden, N. Y., and its office in the city of New York, with S. Bernstein & Sons, Inc., Mr. Solomon Bernstein being president of both corporations. The testimony of the plaintiff's president, which the jury accepted, was briefly as follows: On July 8, 1918, Mr. Bernstein called him on the telephone and asked whether he had khaki clippings, and he replied that he had and would sell him two bales of overcoat clippings and one bale of worsted clippings, and quoted a price of forty-five cents a pound for the overcoat clippings and seventy-five cents a pound for the worsted. Mr. Bernstein told him that he would purchase them and would confirm the purchase in writing, which he did on the tenth of July. The overcoat clippings were already baled, and on the same day that the written confirmation was received the worsted clippings were sorted out and made up into a bale. The three bales in the afternoon of that day were tagged and set apart to be held for the defendant to call for them. Thereafter the defendant sent a truck to plaintiff's place of business between twelve noon and twelve-thirty o'clock. The shipping clerk told the truckman that the men were out at lunch, but that if he would wait five minutes some of them would be in and would get the bales down for him. The truckman thereupon drove off. The plaintiff's president repeatedly telephoned the defendant to

send for the goods and on August 22, 1918, wrote to the defendant: "The two bales of khaki overcoatings and one bale of khaki worsteds sold you on July 10th are still awaiting your call. We cannot ask you for money as long as you have not taken the stock in and we need the money, so would ask you to kindly send for these without delay." Defendant replied on August 31, 1918: "We needed the stock urgently when we purchased it from you, and as a matter of fact we sent for it and called you up several times for same, and you did not have it at the time you stated you would have it. Due to government regulations we are not in a position to handle this stock any more, and we considered it cancelled long ago." To this the plaintiff replied stating that the calling up had been done by the plaintiff and not by the defendant, and that the only time a truckman had called for the goods was when the plaintiff's men were at lunch and the driver refused to wait five minutes for them to return, which they presumed was by defendant's orders; and reiterated the demand for the defendant to take and pay for the three bales. Not hearing from the defendant, plaintiff brought this action to recover the purchase price of the goods in the City Court of the City of New York, and recovered a judgment, which was affirmed by the Appellate Term.

The question to be determined on this appeal is whether the title to the goods passed from plaintiff to defendant, and the defendant wrongfully refused to pay. If it did, the plaintiff could maintain the action. (Sales of Goods Act [Pers. Prop. Law], § 144, as added by Laws of 1911, chap. 571.) No place of delivery having been specified in the contract, the place of delivery was the seller's place of business. (Id. § 124, as added by Laws of 1911, chap. 571.) The two bales of overcoat clippings were already made up and in a deliverable state at the time the written order was received by the plaintiff, and the worsted clippings were existing goods in possession of the plaintiff. Very little sorting of the latter was necessary, as plaintiff had received some clippings of this grade from a customer and needed only to sort the worsted clippings from his own stock. This sorting was to separate clippings of different grades and colors. The two bales were in condition

to be immediately appropriated to the contract when the contract was made. The title to the three bales passed when the worsted clippings were sorted and made into a bale so that they were in deliverable shape and they were all set aside and tagged. (Id. § 100, rules 1, 2, as added by Laws of 1911, chap. 571; *Ferry v. South Shore Growers & Shippers Assn.*, 189 App. Div. 542.) If, as Mr. Justice SMITH contends, we should treat this as a contract for the sale of unascertained goods, in so far as the bale of worsted clippings is concerned, title would pass when the bale was made up, tagged and put aside, in a deliverable state awaiting the call of the defendant's truckman. That would be an unconditional appropriation of these goods to the contract with the implied consent of the buyer. (Id. § 100, rule 4, as added by Laws of 1911, chap. 571.) The consent of the defendant may be implied from two circumstances: (1) The defendant sent its truckman for the goods; he came at an hour when it was not possible to make delivery and refused to wait for five minutes. His refusal was not on the ground that the goods had not been selected or inspected by the defendant, nor was there any claim on the part of the defendant on the trial that it had the right to inspect. (2) The defendant, by not claiming the right to make the selection or to inspect the goods after the selection, vested the vendor with implied authority to make the selection and thus vest the title in the vendee. (*Cooke v. Millard*, 65 N. Y. 352, 366.) In that case, upon which Mr. Justice SMITH relies, the distinction is made between the sale by sample of goods to be manufactured, and the sale of existing chattels where the selection from a mass of the same kind was required. The court said: "This doctrine requires the assent of both parties, though it is held that it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection. The vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him (*Browne v. Hare*, 3 H. & N. 484; S. C., 4 id. 822). This doctrine would be applicable to existing chattels where a mere selection from a mass of the same kind was requisite. On the other hand, if the goods are to be

manufactured according to an order, it would seem that the mind of the purchaser after the manufacture was complete, should act upon the question whether the goods had complied with the contract [Citations]. This point may be illustrated by the case of a sale by sample, where the seller agrees to select from a mass of products certain items corresponding with the sample, and forward them to a purchaser. The act of selection by the vendor will not pass the title, for the plain and satisfactory reason that the purchaser has still remaining a right to determine whether the selected goods correspond with the sample."

Thus it appears that the illustration of the sale by sample applied to the case of a sale of goods to be manufactured, and not to a mere selection from a mass of existing chattels, to which the first part of the quotation applied.

And again, preceding the quotation in Mr. Justice SMITH's opinion from the case of *Bog Lead Co. v. Montague* (10 C. B. [N. S.] 481), a very illuminating portion of the *Cooke v. Millard* opinion reads: "It cannot be conceded that there was any acceptance in the present case by reason of the acts and words occurring between the parties *after* the parol contract, and before the goods were prepared for delivery. There could be no acceptance without the assent of the buyers to the articles in their *changed* condition and as adapted to their use. If the case had been one of specific goods to be selected from a mass without any preparation to be made, and nothing to be done by the vendor but merely to select, the matter would have presented a very different aspect. This distinction is well pointed out by WILLES, J., in *Bog Lead Company v. Montague* (10 C. B. [N. S.] 481)."

In the case of *Cooke v. Millard* (*supra*) the defendants desired to purchase certain kinds of lumber in quantities to be specified, and were shown by plaintiffs the lumber then in their yard, which was of the desired quality but needed to be dressed and cut into different sizes. There was much more lumber in the yard shown to defendants than was requisite for their purposes. An oral order was given by defendants for certain quantities and sizes of lumber at specified prices. No particular lumber was selected or set apart to fill the order, nor was any part of it then in condition to be

accepted or delivered. The lumber after being prepared and dressed according to the agreement was piled on the plaintiffs' dock and notice sent to the person designated for that purpose by the defendants. Two days thereafter the lumber was destroyed by fire. The Commission of Appeals clearly distinguished the rules applicable to that case, a contract for the sale of goods to be manufactured, from the rules applicable to the instant case, which was the sale of existing goods to be selected from a mass of the same kind. In the former they held that title did not pass until the goods had been inspected and accepted by the purchaser, while in the latter the vendor had the implied authority from the vendee to make the selection and title passed when the vendor made the selection and everything was done by the vendor to put the goods in deliverable shape and they were unconditionally appropriated to the contract.

In the instant case the clippings were waste from the manufacture of overcoats and uniforms for the use of the army. They were staple goods, ascertained, in existence and at the time of the contract in possession of the seller. The two bales of overcoat clippings were in deliverable condition when the contract was made. The one bale of worsted clippings was in possession of the seller and only required to be selected from other clippings. There was no sample to which they were required to conform, and no process of manufacture through which they had to go, to put them in deliverable shape; they needed merely to be gathered and selected from the mass, baled and tagged. (*Bristol Mfg. Corp. v. Arkwright Mills*, 213 Mass. 172, 176; *Leonard v. Carleton & Hovey Co.*, 230 id. 262, 264; *Sanger v. Waterbury*, 116 N. Y. 371, 374.) I am of opinion that title to the goods had passed and the plaintiff could maintain an action for the price.

The determination of the Appellate Term should be affirmed, with costs.

CLARKE, P. J., and GREENBAUM, J., concur; DOWLING and SMITH, JJ., dissent.

SMITH, J. (dissenting):

Upon July 8, 1918, the defendant ordered of the plaintiff two bales of khaki overcoating clippings and one bale of

khaki worsted clippings for suitings. The plaintiff was engaged in the manufacture of shoddy woolen cloth which was sold to the government. There is no claim here that there was any imposition upon the government. The goods were sold as shoddy cloth. The evidence is not clear whether or not at the time the order was given the overcoating clippings were baled. One of the plaintiff's witnesses swears, in one place, that they were nearly baled, and at another place that it was in process of baling. The worsted clippings for suitings, however, were not baled and, according to the evidence, they were required to be selected from a general mass in which there was mixed other rubbish or goods of a different kind. The plaintiff's witnesses swear that within a couple of days after the giving of the order the worsted clippings were also selected by one of the plaintiff's employees and baled, and that three bales of goods, two of overcoating clippings and one of worsted clippings, were set aside and tagged and marked as for the defendant. The goods were to be delivered by the plaintiff at the seller's place of business. There is a dispute in the evidence as to the time the goods were sent for and as to the circumstances of the refusal of the plaintiff to deliver at that time. Upon this point the jury has found for the plaintiff, so that we must deem it established as a fact that the story of the plaintiff's witnesses is true and that at the time that these goods were sent for by the defendant it was at the noon hour when the men were away for their luncheon, and that the defendant's truckman refused to wait until they would return in order to bring down the bales. One of the plaintiff's witnesses claims to have telephoned several times to the defendant stating that the goods were ready and asking when they could be delivered, and that on August twenty-second he wrote to the defendant that the goods were still awaiting its call.

The plaintiff has brought this action for goods sold and delivered, although confessedly there has never been any actual delivery of the goods, or any other delivery than could be implied from the baling of these goods and setting them aside for the defendant's order. The judgment asked and recovered is for the purchase price of the goods. The contention of the defendant appealing is that the title in the

goods never passed and, if any liability exists, the liability is only for failure to accept the goods.

Before referring to the provisions of the Sales of Goods Act, it may be well to refer preliminarily to a few questions raised in reference to this contract. It is first argued that the title has at least passed to two of the bales which are claimed to have been already put up at the time of the making of the contract, and that the title passed to the third bale at the time that it was thereafter put up and set aside and marked with the defendant's name. But this contract was an entire contract for three bales. I do not conceive that it can be divisible so as to hold that title passed as to part of the contract at one time and to another part at another time. In *Cooke v. Millard* (65 N. Y. 352) the contract was there held to be an executory contract of sale. The goods were destroyed by fire. The plaintiffs, the vendors, sued for the purchase price, and it was there claimed that at least title to part of the goods had passed although another part had not been put in deliverable condition so as to pass title. In discussing this claim the court said: "The contract called for distinct parcels of surface pine boards, clapboards and matched ceiling. Part of the lumber was surfaced, and a portion of it still in the rough. The clapboards were manufactured from stuff one and a quarter-inch thick. It had to be split, surfaced and rabbeted. The order for the various items was a single one, there being 15,441 feet of the surface pine, 10,144 feet of clapboards, and 8,000 feet of matched ceiling. The surface boards and the ceiling were in existence, and only needed dressing to comply with the order. Whether the clapboards can be deemed to have been in existence, may be more doubtful. If a part of the order is within the Statute of Frauds and a portion of it without it, the whole transaction must be deemed to be within it, as an entire contract cannot, in this case, be divided or apportioned. (*Cooke v. Tombs*, 2 Anst. 420; *Chater v. Beckett*, 7 T. R. 201; *Mechelen v. Wallace*, 7 A. & E. 49; *Thomas v. Williams*, 10 B. & C. 664; *Loomis v. Newhall*, 15 Pick. 159.) I think it clear that the contract was in its nature entire. It was in evidence that the intention was to buy enough, in connection with what Percival had on hand, to make up a boat load. This could only be accomplished by

using the entire amount of the order. Accordingly, even if the contract for the clapboards was not a sale, it cannot be separated from the rest of the order, and the cases above cited are applicable."

This contract, then, being an entire contract, cannot be apportioned and a recovery had for a part thereof, nor can it be held that the title passed to a part thereof before the title passed to the three bales ordered. The right of the plaintiff, therefore, to recover the purchase price must be determined as though none of the goods ordered had been baled and put in deliverable shape, or appropriated by the seller to the contract within the meaning of the statute hereinafter referred to.

Again, under the evidence it is clear that the selection by the vendor of these goods for the purpose of placing them in the bales was not a selection "from the same kind" of goods, but was a selection from a mass of mixed goods, those corresponding with the order and other goods not corresponding therewith. The goods were to be selected, not from khaki clippings of different colors. The order appears to have been to select goods to correspond with a certain grade, which is spoken of by the plaintiff in his examination as grade 55. These goods were in a mass of rags in the plaintiff's premises. The baling itself is sworn to by the plaintiff as requiring from fifteen to twenty minutes, but the selection and assortment of these goods required "probably two or three hours." The plaintiff swears that the selection was made by "throwing out the impurities," and further, "to see that there was no foreign material in it," and if there was any foreign material "that is cast aside." Significance is given to this evidence by the fact that this was in fact a "sale of rags," and the further evidence, which stands uncontradicted in this case, that ordinarily about forty per cent of goods delivered under such a contract are rejected as not coming up to grade. It is unnecessary, therefore, to consider that class of cases which refer to a selection to be made by the seller from goods "of the same kind." That expression might well be held to refer to fungible goods in respect of which the assent of the purchaser to the appropriation under rule 4 of section 100 of the Personal Property Law (as added by Laws of 1911, chap. 571) may be

deemed to be implied. The goods clearly were unascertained goods, and there can be in respect of such goods no implied assent to an appropriation by the seller himself in order to pass title to the purchaser.

Again, there is no question here of a delivery as where the contract provides that the delivery shall be made to a carrier, in which case, upon the loss of the goods while in the hands of the carrier, the rule is sometimes stated that the title has passed to the consignee and may revert in the consignor upon a final rejection by the consignee if the goods do not correspond with the goods ordered. There was in the case at bar no delivery whatever, but a bare act of appropriation. The purchaser sent his truck for the goods, but they were not received by the truckman and not delivered to him. For whatever reason, seems to me immaterial, as long as there was in fact no actual delivery either to the purchaser or to any one in his behalf.

Again, the scheme of the act leaves the seller with ample remedy. If title has not passed and the goods cannot be readily sold in the market, he may sell the goods and sue the purchaser for refusal to accept the same, and recover the difference between the purchase price and the price which he has received therefor, under section 145 of the Personal Property Law (as added by Laws of 1911, chap. 571). Under the provisions of that law, however, as I read it, he is confined to that remedy unless the title has passed to the purchaser, in which case he can sue for the purchase price. (See Pers. Prop. Law, § 144, subd. 1, as added by Laws of 1911, chap. 571.) This action was brought for the purchase price, upon the theory that title has passed to the purchaser. There is no claim to recover the purchase price under subdivision 3 of section 144 (as added by Laws of 1911, chap. 571). That subdivision provides that, although the property has not passed, "if they cannot readily be resold for a reasonable price," the seller may offer to deliver the goods to the buyer, and if the buyer refuses them, he may notify the buyer that the goods are thereafter held for him as bailee, and he may thereafter treat the goods as the buyer's and maintain an action for the price. There is no proof in this case that these goods could not be readily sold in the market at a reasonable price. Such proof

is an essential element in a cause of action under subdivision 3 of section 144. Moreover, under the statement of plaintiff's counsel upon the trial, it appeared that the goods could have been sold for a reasonable price. The plaintiff's counsel stated upon the trial that upon July tenth the government had established seventy cents as a maximum price, so that the defendant could go out on the market and buy it for five cents less. Under that statement by the plaintiff's counsel, the plaintiff could easily have sold these goods at a reasonable price, and would have had his right of action for his damages under section 145 of the Personal Property Law. There is no allegation in the complaint that the property could not have been sold at a reasonable price. Moreover, the plaintiff makes no such claim upon this argument, but bases its right to recover solely upon the fact that title to these goods had passed to the purchaser by reason of the selection made by the buyer and the setting apart of the goods appropriated and tagging the same as the goods of the purchaser. The sole question here to determine is, therefore, as to whether under the facts in this case such an act on the part of the purchaser passes the title to the buyer which would authorize it to recover under the 1st subdivision of section 144 of the Personal Property Law, which distinctly authorizes an action to recover the purchase price only where the property in the goods has passed to the purchaser.

By section 98 of the Personal Property Law (as added by Laws of 1911, chap. 571) it is provided, where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 87 (as added by Laws of 1911, chap. 571). The latter clause of this section is not claimed here to be material to this question. By section 100 (as added by Laws of 1911, chap. 571) rules are given for ascertaining the intention of the parties, and by rule 4 it is provided: "Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of

the seller, the property in the goods thereupon passes to the buyer." The plaintiff's contention is that the selection from this mass of rags, containing foreign material and impurities as well as the goods which were properly applicable to the contract, is an appropriation by the seller to the contract with the assent of the buyer. This contention is challenged by the defendant.

In *Cooke v. Millard* (*supra*) the defendants, desiring to purchase a bill of lumber, went to the plaintiffs' yard, where they were shown lumber of the desired quality but which, to meet their requirements, needed to be dressed and cut into different sizes. They gave a verbal order for certain quantities and sizes, amounting at the prices specified to \$918.22, to be taken from the lots examined by defendants. There was a much larger quantity of lumber in the yard, and no particular lumber was selected or set apart to fill the order. It was defendants' intention to purchase enough to fill out a boat load. After giving the order, defendants pointed out the piles from which they desired the lumber to be taken and directed that, when prepared, it should be placed upon plaintiffs' dock and notice given of readiness to deliver. Plaintiffs filled the order, placed the lumber on their dock and gave notice, as agreed. It was not removed, and two days thereafter it was destroyed by fire. In an action to recover the contract price, it was held that the contract was in its nature entire and, though executory, was one of sale within the meaning of the Statute of Frauds; that the subsequent acts of defendants did not turn the executory contract into an executed one, and did not amount to an "acceptance and receipt" of the lumber so as to take the case out of the statute; that the title to the lumber, therefore, never became vested in the defendants, and they were not liable. It will be seen that the first question there decided was that this was an executory contract of sale. The property was cut into the sizes required by the purchaser and was placed upon the seller's dock, as was provided in the contract. The seller had in that case done everything that could be done by him to appropriate the property to the contract. Nevertheless, it was held that such acts did not amount to an appropriation with the consent of the buyer so as to vest the title in the buyer. The opinion

of Commissioner DWIGHT in part reads as follows: "Proceeding on the view that this was an executory contract, it might still pass into the class of executed sales by acts 'of subsequent appropriation.' In other words, if the subsequent acts of the seller, combined with evidence of intention on the part of the buyer, show that specific articles have been set apart in performance of the contract, there may be an executed sale and the property in the goods may pass to the purchaser. (Blackburn on Sales, 128; Benjamin on Sales, chap. 5; *Fragano v. Long*, 4 B. & C. 219; *Rohde v. Thwaites*, 6 id. 388; *Aldridge v. Johnson*, 7 E. & B. 885; *Calcutta Company v. De Mattos*, 33 L. J. [Q. B.] 214, in Ex. Chamb.) This doctrine requires the assent of both parties, though it is held that it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection. The vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him. (*Broune v. Hare*, 3 H. & N. 484; S. C., 4 id. 822.) This doctrine would be applicable to existing chattels where a mere selection from a mass of the same kind was requisite. On the other hand, if the goods are to be manufactured according to an order, it would seem that the mind of the purchaser, after the manufacture was complete, should act upon the question whether the goods had complied with the contract. (See *Mucklow v. Mangles*, 1 Taunt. 318; *Bishop v. Crawshay*, 3 B. & C. 415; *Atkinson v. Bell*, 8 id. 277.) This point may be illustrated by the case of a sale by sample where the seller agrees to select from a mass of products certain items corresponding with the sample, and forward them to a purchaser. The act of selection by the vendor will not pass the title, for the plain and satisfactory reason, that the purchaser has still remaining a right to determine whether the selected goods correspond with the sample. (*Jenner v. Smith*, Law Rep., 4 C. P. 270.) In this case the plaintiff at a fair, orally contracted to sell to the defendant two pockets of hops, and also two other pockets to correspond with a sample, which were lying in a warehouse in London, and which he was to forward. On his return to London he selected two out of three pockets which he had there, and

directed them to be marked to 'wait the buyer's order.' The buyer did no act to show his acceptance of the goods. The court held that the appropriation was neither originally authorized nor subsequently assented to by the buyer, and that the property did not pass by the contract. BRETT, J., put in a strong form the objection to the view that the buyer could have impliedly assented to the appropriation by the seller. It was urged, he said, 'that there was evidence that by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed.' (P. 278.) The same general principle was maintained in *Kein v. Tupper* (52 N. Y. 550), where it was held that the act of the vendor putting the goods in a state to be delivered did not pass the title, so long as the acceptance of the vendee, provided for under the terms of the contract, had not been obtained.

"The result is, that if this sale, executory as it was in its nature, had not fallen within the Statute of Frauds, there would have been no sufficient appropriation by the vendor to pass the title. The transaction, so far as it went, was, even at common law, an agreement to sell and not an actual sale."

The court then proceeds to consider whether there had been an acceptance of this lumber, and on page 369 quotes from the opinion of WILLES, J., in *Bog Lead Co. v. Montague* (10 C. B. [N. S.] 481), where it was said: "It may be that in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to take place before the purchaser has had an opportunity of rejection. In such a case, the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been

complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should follow, not precede, that of the seller, but where the contract is for a specific, ascertained chattel, the reasoning is altogether different. Equally, where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the assent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel."

Later the court cites from the opinion of BRAMWELL, B., in *Coombs v. Bristol & Exeter R. Co.* (3 H. & N. 510): "The cases establish that there can be no acceptance where there can be no opportunity for rejecting." Further, in discussing the meaning of the word "acceptance" under the statute, the court said: "The buyer had a right to see whether the bulk was according to the sample, and until he had exercised that right there was no acceptance." I do not find that the reasoning in this case has ever been questioned in this State.

In the case cited the question involved both the Statute of Frauds and the passing of title under a valid sale. The question was there considered, *first*, as to whether there had been an appropriation by the seller with the assent of the buyer, and also the question whether there had been such an acceptance as would take the case out of the statute. I can see no distinction as to the passing of title between a purchase by sample and a purchase by description. If in a purchase by sample there can be no implied assent that the seller can appropriate the goods to the contract where they must be selected from a mass containing other goods of other kinds, I can find no implied assent of the buyer to the selection by the seller in a sale by description. Furthermore, where, as in the case cited, the goods were to be put in a deliverable state by sawing the lumber into different sizes, if that be held to be an executory contract of sale, and not a contract

to manufacture, the same rule must apply as to the right in the seller to put those goods in such deliverable shape and appropriate them to the contract as in a sale by sample or a sale by description, where a selection must be made from a mass of mixed goods.

In *Andrews v. Cheney* (62 N. H. 404) plaintiff had bought goods of defendant and paid for them. Defendant did not have in stock the goods wanted, and plaintiff selected from samples. The defendant agreed to have the goods at his store within two weeks, at which time plaintiff was to call for them. Within the stipulated time defendant got the goods into his store, set them apart by themselves and marked them with plaintiff's name. The goods, together with the store, were destroyed by fire, the plaintiff not having called for them. Upon the question of title, the court said: "The property in the goods did not pass to plaintiff by virtue of the contract, for they were not then ascertained and may not have been in existence. The agreement on the part of the defendant was executory. He agreed to furnish goods corresponding to the samples selected by the plaintiff. If the goods subsequently procured and set apart by the defendant did not conform to the samples, the plaintiff had a right to reject them. It does not appear that he waived that right. The defendant was not concluded by his selection; he might have sold or otherwise disposed of the particular articles set apart by him and substituted others in their place. A contract of sale is not complete until the specific goods upon which it is to operate are agreed upon. Until that is done the contract is not a sale but an agreement to sell goods of a particular description. It is performed on the part of the vendor by furnishing goods which answer the description. If, as in the case of a sale by sample, the specific goods are not ascertained by the agreement, the property does not pass until an appropriation of specific goods to the contract with the assent of both parties. [Citing authorities.] If the plaintiff authorized the defendant to make the selection, the property immediately upon the selection vested in the plaintiff. (*Aldridge v. Johnson*, 7 E. & B. 885.) It not appearing the plaintiff gave such authority, the goods at the time of the fire were the property of the defendant and their destruction was his loss."

And the rule of law thus announced seems to me to have found exact expression in the statute itself. Under section 144 of the Personal Property Law (as added by Laws of 1911, chap. 571), provision is made for the recovery of the purchase price where the title has passed and also where title has not passed, where tender has been made and the goods are not readily salable at a reasonable price in the market. In 26 Ruling Case Law, at page 628, the rule as regards a tender of property is thus stated: "In case of a debt payable in property, the effect of a tender is to satisfy the debt, by vesting the property tendered in the creditor; and to accomplish that result there should be such a separation or designation of the property, as that the creditor may know his property and distinguish it, and be able to assert successfully his right of property against any one who may invade it, and there must be also an actual offer of the property in payment, a mere readiness to deliver being insufficient." In a note to section 144 of the Personal Property Law the editor of McKinney's Consolidated Laws of New York (Bk. 40, p. 238) says: "By a long line of decisions in this State it has been held that, when the seller of personal property makes due tender of performance, but the buyer refuses to take the goods, the seller may retain the goods as belonging to the buyer and recover the contract price from him. This has been true at common law, regardless of the nature of the goods, whether they were readily resalable or not." To this are quoted a number of New York decisions; but the note further states: "The New York rule on this subject has been greatly modified by the Sales Act. Now only in cases where the goods 'cannot readily be resold for a reasonable price' may the seller force the title on the buyer and recover the price of him. Formerly he could recover the price in all cases after due tender." I can conceive of no more positive act of appropriation than the setting aside of the property in such form as necessary to make a lawful tender of this property. The property must be set aside so that it is clearly distinguishable, and the purchaser must be able to identify the property so that he may take it and claim it as his own. If such act of appropriation as is necessary to a valid tender be sufficient to pass title, then the provisions of subdivision 3 of section 144 are unnecessary, as the purchase

price can be obtained because title has passed. But the rule as there stated, that after such tender the purchase price can only be recovered where the property can be readily resold at a reasonable price, is a clear indication that such tender and the appropriation necessary therefor does not force title upon the purchaser, and the seller is remitted to his action for damages for non-acceptance of the goods under section 145 of the Personal Property Law, and cannot recover the purchase price under section 144 unless he can show that the goods were not readily salable at a reasonable price. It is unnecessary, therefore, to analyze the cases where the assent of the buyer to an appropriation by the seller is implied where the goods are to be selected from property of the same kind or to discuss those cases where the purchaser has made a contract for delivery to a carrier or at a specific place, and delivery has been there made, inasmuch as it cannot be here claimed that the property was to be selected from a mass of property of the same kind, nor that there has been any delivery made at any place specified in the contract, or any delivery whatever made to the purchaser himself.

Inasmuch, therefore, as the complaint states an action for goods sold and delivered, and as no delivery is proven, and as no property has passed to the purchaser under the Personal Property Law, and as there is no allegation in the complaint that the goods could not readily be resold for a reasonable price, the determination and judgment should be reversed and the complaint dismissed. If the seller would seek to recover under section 145 of the Personal Property Law, under which section alone, as I view it, could he, in any event, have a cause of action, he would be required to recast his pleading so as to base his right of recovery upon the purchaser's failure to accept the goods ordered.

DOWLING, J., concurs.

Determination affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NATHAN WIESENTHAL and DAVID WIESENTHAL, Respondents, v. JAMES A. DUNNE, a Justice of the Municipal Court of the City of New York, and JAMES J. BAKER, Appellants.

Second Department, February 4, 1921.

Prohibition — writ will not lie to restrain justice of Municipal Court of City of New York from transferring pending case to another district.

A writ of prohibition will not be granted restraining a justice of the Municipal Court of the City of New York from granting a pending motion to transfer a case to another Municipal Court district, such remedy not being a substitute for an appeal which would be adequate under the circumstances.

APPEAL by the defendants, James A. Dunne and another, from an order of the Supreme Court, made at the Kings Special Term and entered in the office of the clerk of the county of Kings on the 30th day of December, 1920, directing the issuance of an alternative writ of prohibition restraining the said Municipal Court justice from transferring the trial of an action pending in the Municipal Court of the City of New York, borough of Brooklyn, Fourth District, to the borough of Manhattan, Seventh District.

Nathan Wiesenenthal and David Wiesenenthal, the relators, respondents, reside within the fourth Municipal Court district in the borough of Brooklyn. They brought an action in the Municipal Court in that district against James J. Baker to recover ninety-five dollars rent of premises 306 West One Hundred and Forty-sixth street, borough of Manhattan, for the months of October and November, 1920. The defendant Baker answered demanding a jury trial and served notice of a motion for an order transferring the action to the seventh Municipal Court district, borough of Manhattan, which is the district in which are located the premises for which the rent is alleged to be due. The motion was returnable on November 30, 1920, in the court in the fourth district, where Justice DUNNE was presiding under regular assignment. On November 27, 1920, the relators, the plaintiffs in the action, applied

for a writ of prohibition restraining the justice from granting the pending motion upon the ground that he had no power to transfer the trial of the action. The learned justice at Special Term granted the writ of prohibition, filing a memorandum opinion in which he says: "I think the writ of prohibition should be granted. Although the judgment may result in the removal of the tenant from the premises if he does not pay the rental which the court adjudges to be still reasonable, still the action is an action for rent, and not a summary proceeding. It is a personal action. Hence, it was properly brought in the district where plaintiff resides. Rule 35 of the Municipal Court Rules is in contravention of section 17 of the Municipal Court Code."*

William B. Carswell [John P. O'Brien, Corporation Counsel, and Joseph P. Reilly with him on the brief], for the appellants.

James E. Smyth, for the respondents.

KELLY, J.:

I think we are not called upon to decide the controversy between the parties as to the legality or propriety of transferring the trial of the action. There appears to be no warrant for interference by writ of prohibition with the Municipal Court justice. The action was pending in the court in which he was presiding. The court had jurisdiction of the parties and the subject-matter. (*People ex rel. Higgins v. McAdam*, 84 N. Y. 287, 296.) If the motion to transfer the case should be denied we must assume that the justice will deny it. "The legal presumption is that every court will decide right, and conduct the proceedings before them fairly, impartially and correctly." (*Wolfe v. Burke*, 56 N. Y. 115, 119.) If the Municipal Court justice should make an erroneous decision the plaintiffs have the right to appeal. "The writ of prohibition is not favored by the courts. Necessity alone justifies it. Although authorized by statute, it is not issued as a matter of right, but only in the exercise of sound judicial discretion when there is no other remedy. While it issues out of a superior court and runs to an inferior court or judge, its object is not the correction of errors nor relief from action already taken. In no sense is it

* *Laws of 1915, chap. 279, § 17.*—[REP.]

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Second Department, February, 1921.

a substitute for an appeal, as its sole province is to prevent the inferior tribunal from usurping a jurisdiction which it does not possess, although it runs against the exercise of unauthorized power in a proceeding of which the lower court has jurisdiction, as well as when the proceeding itself is instituted without jurisdiction. The sole question to be tried is the power of the inferior court or magistrate to do the particular act in question. * * * It is justified only by 'extreme necessity' when the grievance cannot 'be redressed by ordinary proceedings at law, or in equity, or by appeal.' " (*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 393, and cases cited; *People ex rel. Newton v. Special Term, Part 1*, 193 App. Div. 463.)

The order directing the issuance of the writ of prohibition should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

JENKS, P. J., RICH, PUTNAM and BLACKMAR, JJ., concur.

Order directing issuance of writ of prohibition reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

REBECCA WITHERELL, Respondent, v. EDWARD J. KELLY,
Appellant.

Second Department, February 25, 1921.

Mortgages — foreclosure — equitable estoppel by representation that deficiency judgment would not be procured — appeal — Appellate Division cannot review decision of foreign court as to its jurisdiction in action in which deficiency judgment rendered.

The plaintiff in a foreclosure action is estopped from entering a deficiency judgment against the mortgagor where it appears that in reliance on the assurances of the plaintiff that there would be no deficiency judgment taken against him the mortgagor, with just grounds, remained inert and did not attempt to secure himself or protect himself against a deficiency judgment, but in fact facilitated it by stipulating that the action of strict foreclosure, one wherein there could be no deficiency, should be modified into one of sale.

As a rule, to constitute an equitable estoppel there must be a representation as to a fact past or present, but an estoppel will result where a statement

- relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act.
- A positive statement by the plaintiff that a deficiency judgment would not be taken is not rendered the less positive by giving as a reason that the property would bring enough to cover the mortgage.
- A statement by the plaintiff that "you need not bother about that; we wont bother you with any judgment," made in response to a statement by the defendant that "I do not want you to get any judgment against me," is a positive statement and not the expression of an opinion.
- In an action on a deficiency judgment procured in a foreclosure action in Connecticut, evidence examined, and *held*, that the findings that the defendant herein was not misled by and did not rely on statements made by the plaintiff herein and was not thrown off his guard nor lulled to sleep thereby, and that no representations or statements were made to the effect that no attempt would be made to hold him personally liable for a deficiency, are not supported by, but are against the evidence.
- It seems*, that in this action on the deficiency judgment the Appellate Division cannot review the decision of the Connecticut court as to its jurisdiction over the defendant in the foreclosure action and as to its interpretation of the Connecticut statute.

APPEAL by the defendant, Edward J. Kelly, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 22d day of May, 1920, upon the decision of the court rendered after a trial at the Kings Special Term.

Thomas J. Blake, for the appellant.

William Mason Smith [*John Howard Keim* with him on the brief], for the respondent.

JENKS, P. J.:

The defendant, a resident of New York, owned a country house in Greenwich, Conn., bought in 1908 for \$100,000, of which \$40,000 was in cash and \$60,000 was secured by mortgage. In 1915 or 1916 he was in arrears for the taxes and the interest on the mortgage. In 1918 the mortgagee, this plaintiff, began foreclosure. In general, the practice in Connecticut is strict foreclosure. If, however, any party to the action moves therein for foreclosure by sale, the court decrees it and appoints both appraisers of the value of the realty in view of the sale, and a committee to conduct the sale. This was done in that foreclosure case. The plaintiff had not served this defendant, but on December 11, 1918,

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the defendant with others subscribed a stipulation made in that action. That stipulation consented to foreclosure by sale on January 18, 2 P. M., at Greenwich, Conn., determined the amounts of the judgment debt at \$63,671.56, of the attorneys' fees at \$600, consented to the appointment of certain persons as appraisers and as committee to sell, respectively. The appraisers valued the premises at \$111,800. At the sale made on the day stipulated, the premises were sold to the mortgagee for \$55,000 and a judgment for deficiency was entered against this defendant. This action on that judgment was tried by consent at Special Term. The court made findings of fact and conclusions of law to award judgment to the plaintiff and to dismiss on the merits the defenses of which one at least involved an equitable counterclaim.

The defendant in this action pleads several defenses. The only issue litigated which I shall consider involves conversations between the plaintiff and the defendant in which the plaintiff was represented by Shedd, admittedly her agent for all purposes.

The defendant testifies in part as follows: He had become in default in interest in 1915 or 1916. He did not recollect when he found out that foreclosure proceedings were contemplated. He had five or six conversations with Shedd. At one before January, 1919, Shedd said: "' If you don't settle up and pay the back interest and the taxes on the property, we will sell it out.' I said, ' I don't care if you sell it out or not. I am sick and tired of the property, and have not got money enough to maintain it, and don't want to bother with it, but if it is sold I want to be cleared off entirely.' Q. What did he say? A. Why, he said, ' You will have no trouble about that,' he says, ' the property will bring the money all right.' He says, ' Only we want our money, we want to get our pay, what is due us.' I said, ' Well, I don't care what you do, so long as there is no claim against me, no afterclaps about this thing. I want to be through with it when I am done with it, and I will consent to anything you want me to, so far as that is concerned.' Q. What did he say to that? A. He said, ' There will be no deficiency judgment against you; we won't bother you any, because we think we will get our money out of it.' " On one occasion the defendant said to

Shedd: "If you sell this property I don't want any further — I am willing you should sell it, and I don't want to have any further business with it. I do not want you to get any judgment against me." Shedd said: "Oh, you need not bother about that; we won't bother you with any judgment." This was "about July, 1918 or 1919." It could not have been in 1919, because the defendant testified that at the time of that conversation the proceedings to foreclose the mortgage had not been taken. And finally he says that he had several conversations with Shedd between July, 1918, and the sale of the property, which was held in January, 1919. The defendant testified with reference to his conversations with Shedd: "Q. Did you believe what he said? A. Certainly; I had no reason not to believe it." The question as to whether or not the witness could have raised the money to meet the indebtedness if he had believed there was to be a deficiency judgment against him, was objected to and the answer stricken out. "Q. You relied on what Mr. Shedd told you about there being no deficiency? A. Certainly; otherwise I would not have consented to sell. Q. And because of your reliance on what he told you about there being no deficiency, what did you do? A. I did not do anything, because I relied upon what he said to me." The defendant also testified that he relied on Shedd's statement that he did not want a deficiency judgment against the defendant. The question whether, if he thought that there would be a deficiency judgment against him, he could have done anything to save the property, was objected to as too speculative, the objection sustained and the answer stricken out.

This testimony was not contradicted. Shedd was in court. He was called as a witness by the defendant, but did not testify as to the conversations. He was not called by the plaintiff. The defendant had offered no resistance to foreclosure. He had facilitated it. He had stipulated that the action of strict foreclosure, one wherein there could be no deficiency, should be modified into one of sale. There is nothing improbable that Shedd, with the prospect of a sale of realty officially and conclusively assessed with a view of foreclosure sale at \$111,800 to satisfy a debt of \$63,000, should have felt it entirely safe to assure the defendant that there would be no

deficiency judgment against him. And, on the other hand, there is nothing under the circumstance unreasonable in the belief of the defendant of the truth of the assurance that plaintiff would not enter any deficiency judgment against him. The official determination of the value of the property for foreclosure sale was about \$38,000 in excess of the debt, and Shedd had assured him that Shedd had received fifty to one hundred inquiries about the property and that the time of sale was "as good a time as any."

If the defendant, in reliance upon the assurance of Shedd that there would be no deficiency judgment against him, had just grounds to remain inert and at gaze without further securing himself or without protecting himself against a deficiency, it seems to me that the doctrine of equitable estoppel by representation applies, in that the plaintiff made statements that indicated her abandonment of an existing right of a plaintiff in a foreclosure by sale.

As a rule, to constitute such an estoppel there must be representation as to a fact past or present, but there is a well-recognized exception that applies in this instance. After statement of the general rule, the court in *Insurance Co. v. Mowry* (96 U. S. 547) says: "The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them." (See, too, *Dickerson v. Colgrove*, 100 U. S. 578, 580; *Trustees, etc., v. Smith*, 118 N. Y. 641; *Faxton v. Faxton*, 28 Mich. 159, a leading case cited in *Dickerson v. Colgrove, supra*, and *Trustees, etc., v. Smith, supra*; *Harris v. Brooks*, 21 Pick. 195; *Johnson v. Blair*, 132 Ala. 128; *Stayton v. Graham*, 139 Penn. St. 1-12; *White v. Walker*, 31 Ill. 422-427; 21 C. J. "Estoppel," 145(b); Bigelow Estop. [5th ed.] 650; 2 Herman Estop. 903.) In *Faxton v. Faxton (supra)*, a case essentially like the case at bar, the court per CAMPBELL, J., say: "There is no rule more necessary to enforce good faith

than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect." (See, too, the language of SWAYNE, J., for the court in *Dickerson v. Colgrove supra*, 580.)

The learned counsel for the respondent contends that Shedd's statements were mere expressions of opinion. Of the five or six conversations between defendant and Shedd the defendant seems to narrate the particular statements of two. The defendant testifies that Shedd said to him: "There will be no deficiency judgment against you; we won't bother you any, because we think we will get our money out of it." This contention of the appellant may be considered with reference to these statements. The statement "there will be no deficiency judgment against you," could be taken as the declared purpose of the plaintiff. The statement "we won't bother you any," is likewise a positive assertion. "Because we think we will get our money out of it" may be taken as the reason "they" would not "bother" him. But the statement of the reason does not weaken the assertion. It would have been quite different if Shedd had said, "In my opinion there will be no deficiency judgment against you, because the value of the realty is ample to secure payment of our money;" or, "We will not bother you if the property sells so as to cover our debt;" or, "The value of the property is so great that you need not bother about any deficiency." However this may be, there is in another part of the testimony of the defendant, a statement of a conversation when the defendant said: "I do not want you to get any judgment against me," and Shedd answered, "you need not bother about that; we won't bother you with any judgment." This as testified to is the complete answer of Shedd, and is a positive, unqualified, unequivocal statement. There is nothing opinionative in such language.

I do not overlook the testimony as to the stipulation which enabled the court to change strict foreclosure to foreclosure by sale. The defendant signed this stipulation gratuitously

and thereby, so far as he was concerned, made a deficiency possible. The testimony of the defendant and of Lockwood is contrary to the conclusion that defendant signed the stipulation at the request of Shedd — although defendant also testifies that he signed "another paper" at a time when Shedd made representations to him; and at another part of his testimony the defendant says that he "would not have consented to sell" save that he relied upon Shedd's statement as to the deficiency. He testifies that he attended the sale because he had furniture in the premises, and that he knew nothing of any purpose of the plaintiff to hold him for the deficiency until the service of the summons in this action. He is somewhat corroborated as to the attitude of the plaintiff by the testimony of Williams.

The doctrine of estoppel *in pais* is applicable in law as in equity. (*Williamsburgh Savings Bank v. Town of Solon*, 136 N. Y. 465, 474.) It is not essential that there should have existed in Shedd the intention to mislead. (*Continental Nat. Bank v. Nat. Bank of Commonwealth*, 50 N. Y. 583.) Equitable estoppel need not rest upon consideration or agreement or legal obligation. (*Rothschild v. Title Guarantee & Trust Co.*, 204 N. Y. 464.)

I think that the findings that defendant was not misled by nor relied upon any statements of Shedd or of the plaintiff, and was not thrown off his guard nor lulled to sleep thereby, and that no representations or statements were made to the effect that no attempt would be made to hold him personally liable for a deficiency, are contrary to the evidence.

I think that in this action we cannot review the decision of the Connecticut court as to its jurisdiction over the defendant in the foreclosure action perforce of his execution of the stipulation, although personally I am perplexed as to the jurisdiction. And the same is true as to the interpretation by the Connecticut court of the Connecticut statute whereby any deficiency was determined in this foreclosure action by the Connecticut court, although, speaking for myself, I have grave doubt as to the correctness of that interpretation.

I advise that the judgment be reversed and a new trial be granted, with costs to abide the event, on the ground that the findings of fact embodied in the fifteenth finding, "that

defendant was not misled by and did not rely upon any statements or representations of said agent Shedd or of plaintiff; that defendant was not thrown off his guard nor lulled to sleep by any action or representation of the plaintiff or her agent; that no representations or statements were made to him by plaintiff or her agent to the effect that no attempt would be made to hold him personally liable," are not supported by the evidence, but are against the evidence.

MILLS, RICH, BLACKMAR and JAYCOX, JJ., concur.

Judgment reversed and new trial granted, with costs to abide the event, on the ground that the findings of fact embodied in the fifteenth finding, "that defendant was not misled by and did not rely upon any statements or representations of said agent Shedd or of plaintiff; that defendant was not thrown off his guard nor lulled to sleep by any action or representation of the plaintiff or her agent; that no representations or statements were made to him by plaintiff or her agent to the effect that no attempt would be made to hold him personally liable," are not supported by the evidence, but are against the evidence. Settle order on notice.

MATHIAS LEONHARDT, Respondent, v. THE CITY OF YONKERS,
Appellant.

Second Department, February 25, 1921.

Municipal corporations — sewers — exemption of cemetery from assessment for construction — assessment not extending to full depth of corner lots — omissions and defects not amounting to "total want of jurisdiction to levy and assess" within meaning of Second Class Cities Law, section 164 — half cost of sewer less than two feet in diameter cannot be assessed against city of second class — failure of property owner to resort to procedure laid down by statute for determination of grievances.

The statutory exemption of a cemetery in the city of Yonkers from assessment for the cost of a sewer is binding and controlling on the common council, and is beyond remedy in a suit by a taxpayer for the cancellation of assessments.

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Where a city has followed the procedure laid down by the Second Class Cities Law for the construction of a street sewer, filed the assessment roll with a publication by the common council of a notice thereof and an announcement of a meeting to consider objections presented, a lot owner, who omits to object to the assessment or to avail himself of the prescribed method of judicial review under the statute, cannot successfully maintain a suit in equity to set aside and cancel, as a cloud on his title, the assessments so made, on the grounds that the area of the assessment did not go back to the full depth of the corner lots situated on lateral streets already sewered; that there was an omission to have any cost estimate made as prescribed by section 120 of the Second Class Cities Law; that the published notice for bids did not specify the penalty of the bond which the bidder was to furnish as required by an ordinance of said city, and that the supplemental city charter (Laws of 1908, chap. 452, art. 6, § 18), requiring a statement of the cost of the sewer to be certified to the common council as the basis of an assessment, was not complied with, but instead the comptroller's certificate was sent directly to the assessors, for such defects and omissions do not amount to a "total want of jurisdiction to levy and assess," within the meaning of section 164 of the Second Class Cities Law.

An ordinance which was passed by the common council putting one-half the cost on the city was void, since the sewer was less than two feet in diameter and to impose one-half the cost on defendant, a city of the second class, would be contrary to section 100 of the Second Class Cities Law.

Where the Legislature has provided a mode of publishing notice designating a time and place appointed to present grievances, objections and complaints, which will then be heard and considered, the Legislature may limit and restrict any subsequent resort to judicial proceedings, and the plaintiff after an omission for three years to act cannot now say that his property has been assessed without due process of law.

APPEAL by the defendant, The City of Yonkers, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 24th day of May, 1920, upon the decision of the court rendered after a trial at the Westchester Special Term in an equity suit to set aside and cancel as a cloud on title certain assessments upon plaintiff's property. These are for a sewer built a distance of about 1,626 feet in Ashburton avenue, Yonkers.

Plaintiff's premises (on the west side of the avenue) had a total assessment of \$3,353.48. On the easterly side of the avenue opposite this new sewer is the cemetery property of

the Oakland Cemetery Association which is on a level above the street grade. Some of the grounds of opposition by the residents were that they had long had an adequate house sewer originally built at their expense, and that the lands most benefited by this new sewer were those of this cemetery, from which at times a surface wash descends into Ashburton avenue.

The original ordinance for this sewer passed August 28, 1911, was followed by a contract under which the sewer was completed in 1913. On February 9, 1914, when the assessment question was raised, plaintiff and nineteen others petitioned to the common council asking that the city at large bear one-half such expenses, which the common council referred to the committee on taxes and assessments. The same persons later lodged a formal protest on the ground that such assessments were out of proportion to the benefits derived therefrom, which protest was duly referred to the committee on laws and ordinances.

On December 14, 1914, the common council passed an ordinance amending the original 1911 ordinance. This amendment put half the expense of this sewer on the city at large.

In the following June the comptroller returned a certificate of the items of sewer cost to the board of assessors, but informed them that the same could not be assessed against the city at large because the sewer was less than two feet in diameter. (Second Class Cities Law, § 100.) But this amending ordinance of December 14, 1914, placing half the cost on the city, was never repealed. It was ignored, and an assessment made up and filed in the office of the city clerk, followed by publication of notice that the common council would meet on June 26, 1916, also that prior to that date written objections to such assessment might be filed. Apparently no objections were made, so that at a meeting of the common council on August 28, 1916, the assessment was confirmed, and then sent to the city treasurer for collection.

On publication of notice of sale of the lands for non-payment of such assessments, plaintiff began this suit on January 12, 1920, to enjoin such sale and to cancel the assessments as a cloud on his title. The learned court gave plaintiff judgment, from which this appeal is taken.

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Second Department, February, 1931.

William A. Walsh, Corporation Counsel [John J. Broderick with him on the brief], for the appellant.

Ralph Earl Prime, Jr., for the respondent.

PUTNAM, J.:

These proceedings show defects and irregularities. The question is whether they may now be raised by this lot owner, after filing of the assessment roll, publication by the common council of notice thereof, with announcement of a meeting to consider objections presented, followed by plaintiff's omission to object to the assessment, or to avail himself of the prescribed method of judicial review under the statute. (Second Class Cities Law, §§ 164, 165.) Did such defects and omissions amount to a "total want of jurisdiction to levy and assess" within section 164, or were they errors and irregularities, such as the Legislature might subject to the wholesome doctrine of waiver, if not objected to, and no court application made, within twenty days after confirmation? (Id. § 165.)

Plaintiff's hardship from being assessed towards the whole cost of a sewer that did not materially benefit him, leaving the abutting cemetery lands free, is a consequence of a statutory exemption of this cemetery, which bound and controlled the common council. (Real Prop. Law, § 450;* *Oakland Cemetery v. City of Yonkers*, 63 App. Div. 448; *affd.*, 182 N. Y. 564.) It is beyond remedy in this proceeding. (*Goldsmith v. Prendergast Const. Co.*, 252 U. S. 12.)

However, he has a further objection to lands not being included in the assessment area. The Ashburton avenue sewer crossed the junctions of Seymour and Mulberry streets and Croton Terrace — lateral streets already with drainage by local sewers. The entire west frontage along Ashburton avenue was assessed. But at these corners the area of the assessment did not go back to the depth of these lots, which were cut by diagonal lines so as to exclude parts, making a reduced area which already had drainage in the intersecting street sewers. This was within the legislative power of the common council, in delimiting the assessment area. It did not violate the principles by which it determined what property

* Since *amd.* by Laws of 1918, chap. 404. — [R&P.]

was benefited. (*Spencer v. Merchant*, 100 N. Y. 585; *People ex rel. Scott v. Pitt*, 169 id. 521.)

Among omissions charged is the failure to have any cost estimate under Second Class Cities Law, section 120,* which requires an "estimate of the whole cost" of a public improvement, "including all expenses incidental thereto and connected therewith," as a basis for any contract — a provision to aid in deciding to vote for the work and for the better scrutiny of the bids. This seems to have been omitted. But this was not jurisdictional in the sense that it was beyond the curative effect of confirmation by the common council. (2 Page & Jones Taxation by Assessment, § 932; *Sorchan v. City of Brooklyn*, 62 N. Y. 339.)

General Ordinance No. 2 of the city of Yonkers, adopted January 2, 1908, required (§ 9) the published notice for bids to specify the penalty of the bond which the bidder was to furnish. This was not done. Instead of a bond, the contractor had two obligors join with him in the contract. The ordinance was to let intending bidders know what security they must offer, and the absence of a notice of the required amount of the bond might narrow the field of bidders, and possibly advantage one who had inside information. However, it is nowhere urged or hinted that the contract was unfairly given out, or let on too favorable terms. Such informalities, therefore, did not destroy jurisdiction, nor work any substantial injustice. (*Conde v. City of Schenectady*, 164 N. Y. 258.)

Although the ordinance of December 14, 1914 (which purported to put half this expense on the city), was never actually repealed, it was nevertheless void, because this sewer was less than two feet in diameter. (Second Class Cities Law, § 100.) Though unrepealed, it appears not to have misled the plaintiff. It was *ultra vires*. The general statute known as the Second Class Cities Law limited the powers of the common council of Yonkers in apportioning the cost of sewers under its supplemental charter (Laws of 1908, chap. 452), as it restricted the authority of officials in other cities of that class throughout the State.

* Since amd. by Laws of 1917, chap. 18, and Laws of 1920, chap. 215.—[REp.]

After such a sewer was built, a statement of its cost was required to be certified to the common council as a basis for any assessment. (Laws of 1908, chap. 452, art. 6, § 18.) Instead of an exact compliance, the comptroller's certificate went directly to the assessors. After the assessment had been completed, it was confirmed by the common council, which ratification I think remedied the omission in the first instance to submit the certificate to that body.

Other objections are raised to certain expenses for engineering and like outlays, which were included in this certificate. Apparently these charges come within the comprehensive provisions of the supplemental charter (Laws of 1908, chap. 452, art. 6, § 18).*

Where the Legislature has provided a mode of published notice designating a time and place appointed to present grievances, objections and complaints, which will then be heard and considered, the Legislature may restrict and limit any subsequent resort to judicial proceedings. (*Matter of Common Council of Amsterdam*, 126 N. Y. 158; *Farncomb v. Denver*, 252 U. S. 7.) Plaintiff's omission for over three years to act does not enable him now to say that his property has been assessed "without due process of law." (*Moore v. City of Yonkers*, 235 Fed. Rep. 485.)

It follows, therefore, that plaintiff has not made out such a "total want of jurisdiction to levy and assess" as would entitle him to cancel assessments confirmed after due notice, and without objection.

Hence, I advise that the judgment appealed from should be reversed, with costs of appeal, and judgment of dismissal entered, with new findings and conclusions of law, but without costs of the original suit.

JENKS, P. J., RICH, BLACKMAR and KELLY, JJ., concur.

Judgment, with findings, reversed, and judgment of dismissal entered, with new findings and conclusions of law, with costs of appeal, but without costs of the original suit. Settle order on notice.

* See, also, Laws of 1916, chap. 85, amdg. said § 18.—[R.R.]

OTTO H. WACHTEL, Respondent, v. A. R. MOSLER & COMPANY, Appellant.

First Department, February 11, 1921.

Principal and agent — employment of salesman on commission within restricted territory — when sale not made within territory.

A salesman's contract for compensation by way of commissions on sales made within specified territory does not entitle him to commissions where none of the goods which were the subject of the sales for which commissions are claimed were to be used within the specified territory, but in a foreign land and all negotiations were carried on outside the territory specified, although the formal contract was signed within the territory after half the goods were delivered, and the purchaser under its rules exercised the right of inspection through one of its agents during the manufacture.

SMITH, J., dissents.

APPEAL by the defendant, A. R. Mosler & Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 18th day of February, 1920, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 19th day of February, 1920, denying defendant's motion for a new trial made upon the minutes.

Frederick W. Sperling, for the appellant.

William Rand of counsel [*Frank J. McMann* with him on the brief; *Jerome, Rand & Kresel*, attorneys], for the respondent.

GREENBAUM, J.:

Plaintiff was a salesman in the employ of the defendant which was a corporation engaged in the manufacture of spark plugs for automobiles. The only sales involved are two war orders for spark plugs received by the defendant in 1917 from the United States War Department for the United States expeditionary forces in France. It is undisputed that the sales were procured by the defendant and not by the plaintiff. It is also undisputed that the plaintiff would be entitled to the commission notwithstanding that the defendant procured the orders, provided these sales are to be deemed as made

within the territories mentioned in the written contract between the parties.

The question is whether the sales in dispute were in plaintiff's territory, within the meaning of the contract. The agreement, so far as material, reads as follows: "We employ you as our salesman in New York City and in New Jersey as far as Trenton (not included); Westchester County as far as Peekskill, N. Y. (not included); Jersey coast as far and up to Atlantic City (not included); Long Island, Brooklyn, Staten Island, and such other territories where from time to time we may request you to go. Compensation shall be at the rate of 10% commission on all sales made by you or by us in your territory above mentioned, when shipped and paid for * * *. No manufacturing business, jobs, special brands or export orders shall apply in the above figures."

The circumstances under which the orders were procured are not in dispute and were substantially as follows: On August 10, 1917, the defendant, whose factory is located in New York city, received a letter from the War Department, Quartermaster-General's office, Washington, D. C., requesting quotations on certain kinds of spark plugs, price "F. A. S.," New York, properly crated for export shipment, and asking that replies be addressed to Quartermaster-General, Washington, D. C., attention of Capt. H. A. Hegeman, who was the regular army officer in charge of the department.

Thereupon the defendant's sales manager, a Mr. Fisher, after phoning to Washington and making an appointment, went to Washington with Mr. Mosler, defendant's vice-president. They prepared samples and figured out prices on a special schedule, and after a conference at the Quartermaster-General's office at Washington, defendant wrote a letter in the form of a quotation or bid addressed to the Quartermaster-General at Washington, dated August 14, 1917, and thereafter submitted it in person in Washington to one Captain Barndollar, who had charge of this particular order and with whom they went over the requirements of the War Department for the spark plugs in question. Upon Captain Barndollar's request they amended the bid and prepared a new bid in the form of a letter dated August 16, 1917, also addressed to the

Quartermaster-General at Washington and submitted it then and there to Captain Barndollar. Captain Barndollar stated that the government wanted some extra gaskets and as a result of communications that passed between plaintiff and the officials in Washington an additional order of comparatively small amount was given. On August 22, 1917, Mr. Fisher, the defendant's sales manager, saw Captain Barndollar at Washington and went over in detail the different types of plugs required. Captain Barndollar selected the precise types he wanted, decided upon the quantities and fixed the prices. He thereupon dictated a letter dated August 22, 1917, which is defendant's exhibit "A" set forth in the printed case on appeal.

It will be seen by reference to that letter that the New York quartermaster was directed to purchase from the defendant the goods specified in the quotation, in the quantities and at the prices stated in the letter and to execute an agreement as set forth therein, which thereafter was signed by the local quartermaster in New York pursuant to the exact details and in accordance with the direct and positive instructions of the Quartermaster-General's Department.

It also appears that after the letter had been prepared at Washington to be sent to the New York quartermaster, Captain Barndollar stated to Mr. Fisher: "I guess this is the biggest order you ever pulled off. * * * Now go back to New York and get busy," and he handed Mr. Fisher one of the copies of the letter. He also told Mr. Fisher that the reason the letter was sent to the New York quartermaster was because his corps would have to supervise inspection at the defendant's factory which was in the district covered by that department.

Thereafter one Captain Kelsey, who was connected with the quartermaster's corps in New York city, from time to time visited the factory and made inspections for the purpose of ascertaining whether the goods were being properly prepared. The goods were delivered in four separate installments, all directed free alongside the army transports at Hoboken, N. J., and boxed for export shipment marked, "Base Quartermaster, Expeditionary Force, France."

The formal contract as matter of fact was executed in

New York in November, 1917, after about one-half of the merchandise had already been shipped. It also appears in evidence that Captain Kelsey stated that the New York quartermaster was only permitted on his own authority to make purchase of supplies for New York for the running of his office and that if an order exceeded \$100 it was necessary to obtain authority to purchase from Washington. It was conceded on the trial that the two transactions in question were not "manufacturing business, jobs or special brands," as those words were employed in the contract between the parties, and that they were not "export business" within the meaning of the contract. The court directed a verdict in favor of the plaintiff upon the theory that the sales in question were made within the exclusive territories granted to the plaintiff under the contract.

We cannot agree with the conclusions reached by the learned trial justice. The spark plugs which were the subject-matter of the government contracts were not intended for use in any of the territories named in the contract between the parties. It was expressly agreed in the government contract that the goods were to be delivered "free alongside the transports at Hoboken, New Jersey," and boxed for export shipment, marked "Base Quartermaster, Expeditionary Force, France." Nor can there be any question that the sales of the spark plugs were made in Washington, D. C. The mere circumstance that under governmental regulations the formal signing of the contracts was performed by the New York quartermaster did not make the sale a New York sale. Every detail of the contracts had been agreed upon in Washington and the New York quartermaster was a mere instrumentality, carrying out the directions of the Quartermaster-General's Department in Washington.

The judgment and order must be reversed, with costs, and judgment is directed in favor of the defendant, with costs.

CLARKE, P. J., DOWLING and PAGE, JJ., concur; SMITH, J., dissents and votes for a new trial on the ground of exclusion of competent testimony.

Judgment and order reversed, with costs, and judgment ordered in favor of defendant, with costs.

DANIEL M. GERARD and THOMAS J. MORRIS, Respondents, v.
EMPIRE SQUARE REALTY COMPANY and Others, Appellants.

Second Department, February 25, 1921.

Corporations — power of majority of directors, acting separately and not collectively, to bind corporation to executory contract — acts of all directors who own all stock bind corporation though they act separately and not collectively — measure of damages for breach of executory contract of employment — claim for money expended cannot be included — appeal — question not presented by record cannot be considered.

In an action to recover for breach of an executory contract of employment it appeared that the defendant corporations were owned by five members of a family and that all the stockholders were directors; that three of the directors acting individually signed a paper, as directors and stockholders, agreeing to hire the plaintiffs for one year at a stated salary and agreed to vote to confirm such appointment at the annual meeting of stockholders; that it was a disputed question on the trial whether the other two directors and stockholders agreed to or ratified the paper so signed. The trial court directed a verdict for the plaintiffs and denied defendants' request to go to the jury on the issues whether a contract was made, whether the plaintiffs had performed, and upon the amount of damages.

Held, that while the president of a corporation, acting as such, has the power, *prima facie*, to bind it by any contract that the board of directors could authorize or ratify, still an employment of the plaintiffs by the president of the defendant companies cannot be spelled out of a writing which in expressed terms is a consent as a director and stockholder to their employment, with a promise to vote to confirm the same at the next stockholders' meeting.

A majority of the directors acting separately and not collectively at a meeting cannot bind the corporation by an executory contract, and, therefore, the judgment on a directed verdict cannot be sustained.

The complaint should not be dismissed, however, but a new trial should be granted, for where the directors of a corporation own all the capital stock and are members of the same family but so at variance that directors' and stockholders' meetings are not held, their action, concurred in by all, although separately and not as a body, binds the corporation.

The measure of damages for a breach of an executory contract of employment is not the full amount agreed to be paid for the unrendered services, but is compensation resulting from the breach, and that question should have been submitted to the jury.

It was error to include in the directed verdict the amount of the claim by the plaintiffs for money expended by them for the use of the defendants, since that was a cause of action distinct from that set forth in the complaint.

App. Div.]

Second Department, February, 1921.

The claim of the plaintiffs that the judgment should be affirmed because the defense was not authorized by the corporations cannot be considered, for upon the record the defendant corporations are regularly before the court and the only question presented is the validity of the judgment entered on the directed verdict.

APPEAL by the defendants, Empire Square Realty Company and others, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Suffolk on the 11th day of March, 1920, and also from an order entered in said clerk's office on the 22d day of March, 1920, denying defendants' motion to set aside the verdict and for a new trial made upon the minutes.

The action is to recover damages for breach of a contract of employment. The case was brought to trial before the court and a jury, and at the end of the trial the court, over the objection and exception of defendants' counsel, directed a verdict for the plaintiffs for \$4,675 with interest, upon which a judgment of \$4,901.44, damages and costs, was entered, from which the defendants appeal.

The defendants are four corporations each owning a parcel of real property in the city of New York, improved for renting purposes. The entire capital stock of the four corporations is owned by Charles E. Miller, John L. Miller, Jr., Warren A. Miller, George H. Miller (brothers), and Emma J. M. Earp, a sister. These five also constituted the board of directors of each corporation. The officers of the corporations were also the same. Charles E. Miller was president; Mrs. Earp was vice-president; John L. Miller, Jr., was secretary and treasurer and also general manager. There were dissensions in the family, which interfered with the business of the companies and led to the omission of stockholders' and directors' meetings. On February 19, 1919, John L. Miller, Jr., under authority expressly conferred by the boards of directors, appointed plaintiff Gerard, by a written instrument, as aid in managing the business of leasing and collecting the rents of the premises owned by the four corporations. The employment specified no time for continuance, nor compensation, which, however, was arranged at \$200 a month, being the amount specially allowed to Miller as general manager. The appointment having been made, John L. Miller, Jr., went on a trip to

the south, and Gerard, with the assistance of plaintiff Morris, managed the business of the four corporations in his absence.

On the 23d of March, 1919, George H. Miller executed and delivered to the plaintiffs a paper which began: "As director and stockholder of the Empire Square Realty Company, Rellim Construction Company, Riverdale Construction Company, and Albertina Realty Co., I hereby agree to the appointment of Daniel M. Gerard and Thomas J. Morris, as agents, to manage the properties owned by the said companies for the ensuing year, commencing April 1st, 1919, at a salary of Six Thousand (\$6000.00) Dollars per year, the same to be paid in monthly instalments on the first day of each and every month as it becomes due." Then follows a detailed description of the plaintiffs' duties under said employment, and the document ends with the words: "At the annual meeting of the several companies, I agree to vote to confirm such appointment on the terms above mentioned." On March 24, 1919, an exact duplicate of the paper was signed by W. A. Miller. A few days thereafter Charles E. Miller, the president of the company, also executed a duplicate, except that he appended these words: "And further to adjust the questions arising between the stockholders as to their interests therein and settle matters that may come up including the division of interest in the respective companies."

The plaintiff testified that John L. Miller, Jr., agreed orally to this employment, and contends that Mrs. Earp agreed to it by necessary implication from her conduct, and that the corporations ratified it by accepting the services of the plaintiffs until July first and paying therefor at the rate of \$500 per month. John L. Miller, Jr., denied that he knew of or agreed to such employment, and testified that he paid plaintiff Gerard without knowledge thereof, in the belief that he was paying him as assistant to himself under the original appointment. Mrs. Earp denied that she ever knew of or accepted the alleged employment. The plaintiffs claim that they were discharged from the employment on July first by John L. Miller, Jr. John L. Miller, Jr., testified that the plaintiffs left voluntarily. The court directed a verdict for the full amount of the salary for the year.

App. Div.]

Second Department, February, 1921.

Middleton S. Borland [*Percy F. Griffin* with him on the brief], for the appellants.

Frederick W. Sparks, for the respondents.

BLACKMAR, J.:

At the close of the evidence the defendants moved to dismiss the complaint, and the plaintiffs moved for direction of a verdict. The court announced the direction of a verdict for the plaintiffs, whereupon the defendants asked to go to the jury on the issues whether a contract was made, whether the plaintiffs had performed, and upon the amount of damages. The court entertained the motion and denied it, and the defendants duly excepted to the direction of the verdict. This exception presents the question of law whether there were such questions of fact in the case as entitled the defendants to go to the jury. (*Brown Paint Co. v. Reinhardt*, 210 N. Y. 162.)

It is written that the president of a business corporation has the power, *prima facie*, to bind it by any contract that the board of directors could authorize or ratify. (*Oakes v. C. W. Co.*, 143 N. Y. 430; *Patterson v. Robinson*, 116 id. 193; *Davies v. Harvey Steel Co.*, 6 App. Div. 166.) But the president of the four corporations did not, by the written instrument set forth in the statement of facts, employ the plaintiffs by virtue of his office as president. It is apparent that an employment by the president of the companies cannot be spelled out of a writing which in expressed terms is a consent as a director and stockholder to their employment, with a promise to vote to confirm the same at the next stockholders' meeting.

The paper was signed by three of the directors out of a full board of five. It is a disputed question of fact whether it was ratified or agreed to by the other two. The judgment cannot be sustained on a directed verdict unless a majority of the board of directors, acting separately and not collectively at a meeting, can bind the corporation by an executory contract. That no such power exists in a majority of the board is an established rule of universal application. The judgment must, therefore, be reversed. The serious question is whether the plaintiffs presented evidence that uncontradicted would justify the finding that there was a contract of employment binding on the corporation. If they did not, this court should

dismiss the complaint. If they did, a new trial should be granted. The plaintiffs are not suing for wages for service performed, but for damages for breach of the contract in discharging them. To establish this cause of action they must prove a contract of employment for a year, made by the defendants through the action of their boards of directors; for this is the contract alleged in the complaint and in the bill of particulars.

Three of the directors have consented in writing, and there is evidence tending to show that the other two also consented. But the directors acted separately and not collectively as a body. There is no doubt that the general rule is that directors must act collectively. In *People's Bank v. St. Anthony's R. C. Church* (109 N. Y. 512), Judge ANDREWS, writing for the court, said: "The trustees of a corporation have no separate or individual authority to bind the corporation, and this although the majority or the whole number, acting singly and not collectively as a board, should assent to the particular transaction." There are many other authorities to the same effect. (*Constant v. Rector, Wardens & Vestry of St. Albans Church*, 4 Daly, 305; *Catholic F. M. Society v. Oussani*, 215 N. Y. 1; *Baldwin v. Canfield*, 26 Minn. 43; *United Brethren Church of New London v. Vandusen*, 37 Wis. 54.) The principle is recognized in *Young v. U. S. Mortgage & Trust Co.* (214 N. Y. 279), for the court, having found that the executive committee acted as a body, decided only that a formal minute or record of the act was not necessary.

I may, therefore, start out with the rule, generally applicable, that directors, acting separately and not collectively as a board, cannot bind the corporation. I will stop a moment to say that there is no room for the application of the doctrine of estoppel; for the plaintiffs are not suing for the value of property or service acquired by the corporation through the irregular act of the directors, but for breach of an executory contract only.

The general rule seems to rest upon two reasons: *First*, that collective action is necessary in order that the act may be deliberately adopted after an opportunity for discussion and an interchange of views; and, *second*, that the directors are, for the purpose of managing the affairs of the corporation, the agents of the stockholders and are given no power to act

otherwise than as a board. Now, if all the directors are of one mind, the reason first stated is much weakened if not destroyed, for if all are agreed discussion is futile; and if the directors own all the corporate stock the second reason also disappears, for they are both principals and agents and their unanimous acts as directors carry their consent thereto as stockholders.

I think that under the circumstances of the case we are considering, where the directors own all the capital stock of the corporations, where they are members of the same family but so at variance that directors' and stockholders' meetings are not held, their action, concurred in by all, although separately and not as a body, binds the corporation. We must recognize the fact that to a greater and greater degree all business, great and small, is being brought under the management of corporations instead of partnerships; that they are, in perhaps the majority of instances, conducted by officers and directors little informed in the law of corporations, who often act informally, sometimes without meetings or even by-laws. To hold that in all instances technical conformity to the requirements of the law of corporations is a condition to a valid action by the directors, would be to lay down a rule of law which could be used as a trap for the unwary who deal with corporations, and to permit corporations sometimes to escape liability to which an individual in the same circumstances would be subjected. I cite some authorities resting upon the principle that I have suggested. (*Bank of Middletown v. Rutland & Washington R. R. Co.*, 1 Shaw [Vt.], 159; *Matter of Great Northern Salt & Chemical Works, Ex parte Kennedy*, 44 L. R. Ch. Div. 472; *Jordan & Co. v. Collins & Co.*, 107 Ala. 572; *Burden v. Burden*, 159 N. Y. 287; *Hall v. Herter Brothers*, 83 Hun, 19; *Sheridan Elec. Light Co. v. Chatham Nat. Bank*, 52 id. 575.) I think, therefore, that if all the directors in the four corporations, being also holders of all the capital stock, agreed to the employment of the plaintiffs, their acts bind the corporations and a contract of employment so made is valid.

There are two other questions of fact that should have been submitted to the jury. One is whether the plaintiffs were discharged or whether they voluntarily agreed to relinquish the employment, and the other is the question of damages.

The measure of damages is compensation. If the contract is established, the plaintiffs were entitled to \$500 a month for services rendered. It cannot as matter of law be said that the true measure of compensation is to award to them the full amount of their salary where the services that were the consideration therefor were not performed. The question of the amount of damages should have been left to the jury to determine the actual loss to the plaintiffs under all the circumstances which may be developed on the new trial.

It was error also to include in the directed verdict the amount of the claim of \$175 for money expended by the plaintiffs for the use of the defendants. This is a cause of action distinct from that set forth in the complaint, and it was not competent for the court, against the objection and exception of the defendants, to include the amount of this unalleged cause of action in the award of damages.

The claim of the plaintiffs that the judgment should be affirmed because the defense was not authorized by the corporations, cannot be considered on this appeal. Upon the record before us the defendant corporations are regularly before the court, appearing by an attorney. Nothing is presented on this appeal but the validity of the judgment rendered after due trial upon the issues raised by the pleadings.

The judgment and order should be reversed and a new trial granted, with costs to abide the event.

JENKS, P. J., RICH, PUTNAM and JAYCOX, JJ., concur.

Judgment and order reversed and new trial granted, with costs to abide the event.

NORTH AMERICAN FISHERIES AND COLD STORAGE, LTD.,
Respondent, v. LOUIS H. GREEN, Appellant.

First Department, February 4, 1921.

Payment — application of payment — application on account of goods which had not been delivered at time of payment and not on account of note then due.

In an action on a promissory note given for a balance due on the purchase price of fish in which the only question litigated was whether a payment made to the defendant was rightfully applied to the account of a trans-

action wholly unrelated to the note, it appeared that the transaction to which the payment was applied involved the purchase of fish on which a deposit had been made and that said fish were not delivered till several days after the payment in question.

Held, on all the evidence, that for manifest error of the trial court in instructing the jury that there was no dispute about an important issue of fact and in failing to correct the error when its attention was particularly directed to it by the appellant's counsel, the judgment should be reversed and a new trial ordered.

DOWLING, J., dissents.

APPEAL by the defendant, Louis H. Green, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of June, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

E. A. Sherrick of counsel [*L. I. Shelley* with him on the brief; *Medina & Sherrick*, attorneys], for the appellant.

Nathaniel Phillips of counsel [*Samuel Walter Levine* with him on the brief], for the respondent.

GREENBAUM, J.:

Plaintiff is a Canadian corporation engaged in the freezing of fish which it markets in wholesale quantities. Its main plant is located in Nova Scotia. It is undisputed that on July 23, 1919, defendant purchased from the plaintiff 104,000 pounds of mackerel at the agreed price of \$14,800 and delivered to the plaintiff a draft of \$8,000 drawn by the defendant in part payment of the purchase price and a promissory note for the balance of \$6,800, dated July 23, 1919, payable three months after its date.

It is upon this note that the action was brought. The eight-thousand-dollar draft was paid in due course. The only question litigated was whether defendant paid the sum of \$4,000 on account of this note for \$6,800. It is admitted by the plaintiff that it received from the defendant \$4,000 on January 8, 1920, which it applied to the account of a transaction wholly unrelated to the note. That transaction was a contract made August 29, 1919, for the purchase by the defendant from the plaintiff of 159,000 pounds of pollock at the price of \$6,360 to be delivered at Boston.

It is undisputed that such a contract was made; that on September 18, 1919, the sum of \$1,000 was paid thereon as a deposit to the plaintiff; that the pollock was not to be delivered until some months after the date of the contract and that in fact it was not delivered until January 12 or 13, 1920, four or five days after January eighth, the date of the \$4,000 payment.

The narrow question is, was the sum of \$4,000 paid by defendant to the plaintiff on account of the pollock transaction?

The note in suit was due on October 23, 1919, so that on January 8, 1920, it was long overdue. The testimony with regard to the terms of the sale of the pollock was conflicting. Plaintiff's testimony was that the goods were sold for cash, meaning thereby that the fish was to be paid for in advance of delivery; that the \$1,000 was a deposit on account of the sale and that it was expected that the balance would be paid within a reasonable time thereafter, which on such a contract would be within two or three months after the contract had been made but before the delivery of the goods.

The plaintiff when it received the \$4,000 credited that amount on account of the pollock transaction. If nothing had been said as to the account upon which the payment was made, plaintiff had a right to apply it to which ever account it saw fit provided the balance of the contract price of the pollock was then due. (*Bank of California v. Webb*, 94 N. Y. 467, 471.)

A reading of the testimony shows that there was a question of fact presented to the jury as to whether or not the plaintiff was justified in applying the \$4,000 to the pollock sale.

The appellant, however, claims that there were errors committed upon the trial which would justify a reversal of the judgment. The first of these relates to the refusal of the trial court to grant an application for an adjournment of the trial for a few days in order to enable defendant to produce a witness named Harnish, whose testimony was material on the issues that were tried. We are inclined to think that sufficient reasons were presented to justify the granting of a brief adjournment of the trial, but nevertheless we are of opinion that the court did not exceed its discretion and that the verdict should not be disturbed on that account.

The next alleged error upon which defendant relies is that the court erred in refusing to charge the jury that if there was nothing due on the pollock sale at the time of the payment of \$4,000 they must find that the payment was made on account of the mackerel, that is to say, on account of the note in suit. The court refused to charge in the language as requested, but stated that it would "charge that if the jury determine that there was no payment due on the pollock at the time of the payment of the \$4,000, that that is a circumstance that the jury may consider in connection with all the other circumstances of the case as to how the payment was made."

There was testimony given in behalf of plaintiff that would have warranted the jury in finding that it was understood that the payment of \$4,000 was to be applied to the pollock account. Under these circumstances the charge of the learned trial justice was unassailable.

It seems to us, however, that the court committed a serious error in charging the jury that "the pollock account was an open account, there is no dispute about that." As matter of fact there was a dispute about that. Defendant's counsel at the close of the judge's charge said: "I desire to take exception to your charge that there is no dispute as to the pollock account being an open account; we dispute it strongly. The Court: Your client testified that that account was open. Mr. Sherpick: I take exception to your Honor's ruling. The Court: All right, sir." The defendant testified that the pollock was sold upon the agreement that the balance of the purchase price was to be paid after the fish was delivered and that there was nothing due on that sale on January eighth. There was thus a disputed question of a material fact which should have been submitted to the jury and when the court's attention was called to the statement in the charge that there was no dispute as to the pollock account being an "open account" it should have corrected the error.

The respondent in its brief attempts to justify the statement of the court that it was an open account upon the ground that legally the word "open" has been defined to mean an account "that is not closed." It seems to us, however, that we must consider the words "open account" as the jury would have naturally understood the meaning of those words

and as the court evidently meant them to be understood. The jury was justified in assuming that the words "open account" meant that it was an account that was due. We are constrained, therefore, to reverse the judgment.

The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

SMITH, J., concurs; CLARKE, P. J., and PAGE, J., concur in result; DOWLING, J., dissents.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

MARTIN P. PLUMB, Respondent, v. RICHMOND LIGHT AND RAILROAD COMPANY, Appellant, Impleaded with JOSEPH J. PHILLIPS, Defendant.

Second Department, February 25, 1921.

Street railways — action by passenger to recover for injuries received when struck by motor truck colliding with trolley car — doctrine of *res ipsa loquitur* not applicable — charge as to presumption of negligence on part of railroad company.

The doctrine of *res ipsa loquitur* can never be applied with accuracy unless all the agencies that are factors in the accident are under the control of the defendant and the accident is one which would not have happened in the ordinary course of events providing reasonable care had been exercised by the defendant.

Hence, in an action against a railroad company and the owner of a motor truck to recover for injuries as the result of a collision between a trolley car and the motor truck the doctrine of *res ipsa loquitur* is not applicable, because although the circumstances were such as to permit the inference of negligence, yet the negligence may have been that of the driver of the motor truck and not of the operating employee of the railroad company.

It was not error, however, for the court to charge, in effect, that under the circumstances of the case there was on the part of the carrier a presumption of negligence that would justify a finding of negligence, in the absence of an explanation of the cause of the accident consistent with the exercise of ordinary care.

Said presumption rests primarily upon the duty which a common carrier owes to its passengers, in connection with circumstances showing that the injury might have been occasioned by a failure in the performance of such duty.

REARGUMENT of an appeal by the defendant, Richmond Light and Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 30th day of April, 1920, upon the verdict of a jury for \$15,000, and also from an order entered in said clerk's office on the 3d day of May, 1920, denying defendant's motion for a new trial made upon the minutes. (See 194 App. Div. 972.)

Guy O. Walser [*Bertram G. Eadie* with him on the brief], for the appellant.

Francis X. Carmody [*Morrison T. Hankins* with him on the brief], for the respondent.

BLACKMAR, J.:

At the time of the accident which resulted in injury to the plaintiff he was riding on the left-hand running board of an electric street car operated by defendant railroad company. Both the interior of the car, which was an open one, and the right-hand running board were so completely occupied that the plaintiff was unable to get upon any part of the car except the left-hand running board. While in this situation the defendant company accepted his fare and permitted him to continue to ride there. At the time of the accident, as the car was proceeding slowly, the plaintiff, looking ahead, saw a motor truck about fifty feet away, coming towards it. The motor truck swung around a vehicle in front of it, and in so doing approached so nearly the line on which the car was traveling that the plaintiff tried to escape possible contact by climbing inside the car; but, failing in this, he was struck by the motor truck or by a skid protruding from it and severely injured. As the truck was approaching there was no change in the speed of the trolley car and it was in motion at the time the plaintiff was struck.

The jury found a verdict against both defendants — the railroad company and the owner of the motor truck; but the railroad company alone appealed. In the course of his careful charge to the jury the learned justice who presided at the trial used the following language: "The management and control of the transportation of the passenger is wholly confided to the

employees operating the car, and the passenger cannot be expected to account for a collision if one takes place. When such a collision takes place, there arises, as a rule of evidence, a presumption of negligence upon the part of the carrier, which calls upon it for an explanation. I do not mean, in making this statement, that this rule of evidence shifts the burden of proof from the shoulders of the plaintiff onto the shoulders of the defendant, but only that the company, from the fact of the collision, if you find that there was a collision, is called upon to make an explanation; and then it is for you to determine, on the whole case, on all the evidence, whether there is a preponderance of the evidence in favor of the plaintiff's contention that there was negligence upon the part of the defendant." To this the counsel for the railroad company excepted.

This instruction of the court, not being a general statement of the law, but a definite rule, given for the guidance of the jury in this particular case, seemed to this court, in considering the matter after the argument, to be open to so much question that a reargument was ordered upon this point. Counsel for both parties, assuming that the court had charged the jury that the doctrine of *res ipsa loquitur* applied to this case, have, both in their briefs and on the oral argument, carefully and exhaustively presented to the court a review of the authorities and arguments pro and con upon the question of the correctness of the charge in view of the particular facts developed by the evidence upon the trial.

My conception of the doctrine of *res ipsa loquitur* is that it can never be applied with accuracy unless all the agencies that are factors in the accident are under the control of the defendant and the accident is one which would not have happened in the ordinary course of events providing reasonable care had been exercised by the defendant. (*Griffen v. Manice*, 166 N. Y. 188, 194.) The opinion written by the learned judge in the case last cited is, I think, adopted by the profession generally as being the final expression of that court of the elements necessary to the application of the doctrine of *res ipsa loquitur*. It is there stated to rest on the doctrine of circumstantial evidence, and I have already expressed my opinion that the doctrine is one that permits an inference of

negligence from circumstances which do not necessarily exclude any other hypothesis, leaving it for the defendant, by explanation, to exclude such hypothesis. (*Maslenka v. Brady*, 188 App. Div. 663.) If all the agencies are not in the control of the defendant, although the circumstances shown in the evidence are such as to permit the inference of negligence the doctrine is not applicable, because it may be the negligence of a third party which caused the accident, and not of the defendant. (*Wolf v. American Tract Society*, 164 N. Y. 30; *Hardie v. Boland Co.*, 205 id. 336.) In such a case the party responsible is not identified. I think, therefore, that the doctrine of *res ipsa loquitur* is not logically applicable to the case at bar, because although the circumstances were such as to permit the inference of negligence, yet the negligence may have been that of the driver of the motor truck and not of the operating employee of the railroad company.

But the learned trial justice did not refer to the doctrine of *res ipsa loquitur* in terms. He charged the jury that under the circumstances of the case, there was on the part of the carrier a presumption of negligence that would justify a finding, in the absence of an explanation of the cause of the accident consistent with the exercise of ordinary care. The reason for the assertion of this rule rests primarily upon the relation of a common carrier to a passenger. In *Loudoun v. Eighth Ave. R. R. Co.* (162 N. Y. 380) the court applied to a street car company the doctrine of presumption of negligence from a collision with another street car at the intersection of tracks. CULLEN, J., writing for the court, said: "The management and control of the transportation of the passenger is wholly confided to the employees operating the car, and the former cannot be expected to be on the watch either as to its management or that of other vehicles, or if a collision takes place, be able to account for its occurrence. Therefore, when such a collision occurs there arises a presumption of negligence on the part of the carrier, which calls upon it for explanation." The close resemblance of the charge of the learned trial justice to this deliberately formulated statement of the law by the Court of Appeals is easily seen; and as the doctrine of the *Loudoun* case stands unchallenged by the Court of Appeals, the trial

justice was justified in his charge, nor are the circumstances of the two cases so different as to call for the application of a different rule.

In the *Loudoun* case the tracks of the Third Avenue Railroad Company and the Eighth Avenue Railroad Company intersected at a street crossing. The plaintiff was a passenger in a car of the Eighth Avenue Railroad Company. That car, while being moved over the place of intersection, was struck by a car of the Third Avenue Railroad Company. The court decided that while there was no presumption of negligence to be drawn against the Third Avenue Railroad Company, whose car struck that in which the plaintiff was riding, yet, on account of the relation of the carrier to the passenger and "the very high degree of care" required by such relationship, the presumption of negligence on the part of the carrier arose from the happening of the accident under those circumstances. The only distinction between that case and the one at bar is that in the case at bar the plaintiff was riding on the left-hand running board of the car, and his situation there imposed upon the railroad company the duty of exercising greater precaution than in the case of a passenger seated within the car. In this case the collision occurred, not with a vehicle moving at right angles, but with one moving in a contrary direction. This differentiating fact does not seem to me to take the case out of the doctrine of the *Loudoun* case. In both cases the motion of the car carrying the plaintiff to the point of the accident was a factor in causing it. I am aware that in *Elliott v. Brooklyn Heights R. R. Co.* (127 App. Div. 300) the learned justice writing for this court said: "I do not understand that the statement in the opinion in *Loudoun v. Eighth Ave. R. R. Co.* (162 N. Y. 380) that from the mere fact of a collision between two street cars of different companies at a crossing the maxim applies to the company carrying the plaintiff, is now to be taken as the law. * * * The later case of *Griffen v. Manice* (166 N. Y. 188) sets all this right and puts it beyond discussion." The *Elliott* case, accurately holding that the doctrine of *res ipsa loquitur* was not applicable, because the wrongdoer was not identified, is not, despite the above-quoted language of the learned writer of the opinion, inconsistent with the doctrine of the *Loudoun* case, which

rests solely upon the duty that a common carrier owes to its passenger. Whether the decision in the *Elliott* case follows the doctrine of the *Loudoun* case is another matter. The ground upon which the decision in the *Elliott* case is based, viz., that the doctrine of *res ipsa loquitur* is not applicable, is not hostile to the *Loudoun* case. The difficulty of reconciling these two cases is caused by the fact that the justice who wrote in the *Elliott* case assumed that the *Loudoun* case, in so far as it authorizes the presumption of negligence on the part of the carrier, rests solely on the doctrine of *res ipsa loquitur*, accurately defined. The opinion in the *Loudoun* case was written by the same eminent judge who subsequently wrote for the court in *Griffen v. Manice*, which did not in terms overrule the *Loudoun* case. In fact in *Hardie v. Boland Co.* (*supra*) the *Loudoun* case is quoted as still the law. The learned judge who wrote in the *Loudoun* case held that the doctrine of *res ipsa loquitur* did not apply, because when there are two agencies concerned in an accident, and the presumption of negligence might apply to either one, the one liable is not identified. But the presumption asserted in that case and charged the jury in the case at bar is a presumption which rests primarily upon the duty which a common carrier owes to its passenger, in connection with circumstances showing that the injury might have been occasioned by a failure in the performance of such duty. So in *Patton v. Texas & Pacific Railway Co.* (179 U. S. 663) Justice BREWER, speaking for the court, said: "In the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely."

So long as the *Loudoun* case remains unquestioned by the Court of Appeals, I think it is our duty to approve a charge which is based upon the doctrine of that case and is applicable to a state of facts not essentially different.

The judgment and order should be affirmed, with costs.

JENKS, P. J., and RICH, J., concur; PUTNAM, J., concurs in separate opinion; KELLY, J., concurs with PUTNAM, J.

PUTNAM, J. (concurring):

The phrase *res ipsa loquitur* does not make for distinctness. Though perhaps not so often misused as *res gestæ*, the maxim that the thing itself speaks has lost its point, and frequently serves to blur the edges of accurate legal definition. As originally used it stated the effect and legal inference from a bare happening like objects falling into a street. (*Mullen v. St. John*, 57 N. Y. 567.) But this soon proved of little practical value in the case of a building going up under different contractors. (*Wolf v. American Tract Society*, 164 N. Y. 30.) So the import of this phrase was enlarged from the bare happening to take in as a proper setting some of the attending circumstances. (*Griffen v. Manice*, 166 N. Y. 188, 193.) The maxim thus comes to saying that with certain other circumstantial evidence a *prima facie* liability may arise; or, as we might say, *res et cetera loquuntur*. A contract duty obviously differs from the case of a pure tort. The apparent failure to carry safely a passenger naturally calls for an explanation. (*Stokes v. Saltonstall*, 13 Pet. 181; *Loudoun v. Eighth Ave. R. R. Co.*, 162 N. Y. 380.) This distinction is now well recognized. (See *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 128, by PARKER, J.) "Excepting where contractual relations exist between the parties, as in the case of carriers of passengers and some others, negligence will not be presumed from the mere happening of the accident and a consequent injury." (*Stearns v. Ontario Spinning Co.*, 184 Penn. St. 519, 523.) The court's charge rightly used the word "presumption," which meant that the street car company which was under the carrier's duty, was expected through its motorman to furnish an explanation, or at least to go forward with its proofs. This principle applies to a passenger on the running board of a street car. (*Bamberg v. International Railway Co.*, 53 Misc. Rep. 403, 406.) The charge was, therefore, free from ground of exception, and I agree to affirm.

KELLY, J., concurs.

Judgment and order unanimously affirmed on reargument, with costs.

In the Matter of the Application of ANASTASIOS D. YEANNAKOPOULOS, Respondent, for an Order Appointing an Arbitrator and Directing an Arbitration to Proceed Pursuant to the Provisions of the Arbitration Law, in Accordance with the Provisions of a Certain Contract in Writing Dated April 26, 1920, Entered into between the Petitioner Herein and J. ARON & COMPANY, INC., a Domestic Corporation, Appellant.

First Department, February 4, 1921.

Arbitration — agreement to arbitrate controversies thereafter arising under contract need not be acknowledged — Arbitration Law, § 8, and Code of Civil Procedure, § 2366, construed and applied — petition and answer establish existence of controversy between parties — appeal — failure to raise question below as to constitutionality of Arbitration Law.

The provisions of the Code of Civil Procedure mentioned in section 8 of the Arbitration Law, read in connection with section 2 of that law, show that the provisions in section 2366 of the Code of Civil Procedure requiring the instrument to be acknowledged apply exclusively to a submission entered into between the parties under the Code of Civil Procedure and not to a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract.

The provisions of section 8 of the Arbitration Law were obviously designed for the purpose of combining the provisions of the Code of Civil Procedure and making them applicable to an arbitration under a contract so far as they are "practicable and consistent" with the provisions of the Arbitration Law, but the formalities prescribed by section 2366 of the Code of Civil Procedure are wholly inapplicable to an arbitration under a contract, for the reason that they would not be "practicable and consistent" under such an arbitration.

The petition and answer, on which the order directing an arbitration of the questions in dispute and appointing an arbitrator was based, show that there is a controversy between the parties arising out of a contract concededly entered into between the parties.

The failure of the appellant to raise the question of the constitutionality of the Arbitration Law, in the answering affidavit or at the Special Term, precludes him from raising that question on appeal.

APPEAL by J. Aron & Company, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York, on the 21st day of December, 1920, granting the petition of

Anastasios D. Yeannakopoulos, directing an arbitration and appointing an arbitrator under the arbitration clause in the contract between the parties, pursuant to the provisions of the Arbitration Law of this State (Consol. Laws, chap. 72; Laws of 1920, chap. 275).

Benjamin F. Norris of counsel [*Bouvier & Beale*, attorneys], for the appellant.

Robert H. Ewell of counsel [*Merrill, Rogers & Terry*, attorneys], for the respondent.

GREENBAUM, J.:

The petition upon which the order was granted alleges in detail the making of a contract between the parties dated April 26, 1920, under which the petitioner agreed to purchase from the appellant 100 tons of Java sugar, a copy of the contract being annexed to the petition; that one of the provisions of the contract was as follows: "Any dispute arising in the execution of this contract to be submitted to arbitration in New York." The petition further alleges that thereafter and on or about July 29, 1920, "said J. Aron & Company, Inc., obtained payment of \$50,400, from [the] First National Bank of Boston, by reason of the credit established by the petitioner" as provided for in the contract between the parties; that said payment was obtained from J. Aron & Company, Inc., without presenting ocean documents or the dock receipt or delivery order as called for by the contract and the letter of credit; that the latter corporation placed in storage with the New York Dock Company of Brooklyn for the account of the petitioner 1,000 bags of sugar claiming that said sugar constituted the 100 tons of Java white sugar mentioned under the contract of April 26, 1920; that the sugar thus put in storage was not the sugar called for by said contract; that the petitioner "offered to return to said J. Aron & Company, Inc., the said sugar, and demanded" that the sum of \$50,400 be repaid to the petitioner, and that thereafter the petitioner sold the 1,000 bags of sugar for the account of the appellant with the result that the petitioner was damaged in the sum of \$30,129.82.

It is also alleged in the petition that thereafter the petitioner requested the appellant corporation to comply with the arbitration clause in the contract, which it refused to do.

It appears from the opinion of the learned justice who granted the order appealed from that the application of the petitioner was opposed on two grounds and indeed it was conceded in open court before us upon the argument of this appeal that these two grounds were the only ones urged and that the appellant did not at Special Term make any claim that the Arbitration Law under which the petitioner obtained its order was unconstitutional. The two points relied upon by the appellant were, *first*, that the agreement to arbitrate was not acknowledged, and, *second*, that the moving papers failed to show that there was any controversy existing which was properly the subject of an arbitration. As to the first of these grounds, the appellant relies upon section 2366 of the Code of Civil Procedure which provides that a submission under the Code may be made "by an instrument in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded." It is argued that under section 8 of the Arbitration Law, the provisions of section 2366 are made applicable both to an arbitration clause in a written contract as well as to a submission to arbitrate under the Code. Section 8, however, provides that section 2366 and the other sections of the Code of Civil Procedure therein enumerated "so far as practicable and consistent with this chapter, shall apply to an arbitration agreement under this chapter."

A study of the various provisions of the Code mentioned in section 8 of the Arbitration Law, read in connection with section 2 of that law, clearly shows that the provisions in section 2366 of the Code requiring the instrument of submission to be acknowledged apply exclusively to a submission entered into between the parties under the Code of Civil Procedure.

Section 2 of the Arbitration Law contemplates two separate and distinct cases where arbitration may be enforced. The first applies to "a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract," and the second to "a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the Code of Civil Procedure." The provisions of section 8 of the Arbitration Law were obviously designed for the purpose of combining the arbitration provisions of the Code and making them appli-

cable to an arbitration under a contract so far as they are "practicable and consistent" with the provisions of the Arbitration Law. In other words, the Code provisions would in all instances apply to an arbitration in the case of a submission pursuant to the Code. They would also apply to an arbitration embodied in a contract where that would be "practicable and consistent" with such an arbitration. But the formalities prescribed in section 2366 of the Code would be wholly inapplicable to an arbitration under a contract, for the reason that they would not be "practicable and consistent" under such an arbitration. It is decidedly "impracticable" to expect written contracts between merchants to be "duly acknowledged" and it is not likely that the Legislature contemplated that the provisions of section 2366 of the Code should have been intended to apply to such an arbitration.

As to the second point it is sufficient to say that the petition and answer upon which the order appealed from was based clearly show that there is a controversy between the parties arising out of a contract concededly entered into between the parties. In addition to the two points which have just been considered, the appellant argues before us the unconstitutionality of the Arbitration Law of this State, on the ground that it deprives the appellant of the right of trial by jury. As heretofore observed, that contention was not made before the Special Term and besides there was no such contention made in the answering affidavit submitted in opposition to the petition. Under these circumstances it seems clear that by failing to raise the plea of unconstitutionality at Special Term, the appellant has waived its right to assert it on appeal. This doctrine has been uniformly recognized in numerous decisions in civil cases in this State. (*Vose v. Cockcroft*, 44 N. Y. 415; *Matter of Andersen*, 178 id. 416, 420; *Fosdick v. Metal Shelter Co., Inc.*, 223 id. 700; *Matter of Kipp*, 70 App. Div. 567.)

The order is affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

ELLA M. BOYLE, an Infant, by ALLEN DEYO, Her Guardian ad Litem, Appellant, v. CHARLES BLANKENHORN and Others, Respondents.

Third Department, February 28, 1921.

Judgments — action to impress trust on real property transferred by judgment debtor after verdict and before judgment entered — lien of judgment not prior to that of deed.

In an action to impress a trust on certain real property it appeared that after a verdict had been rendered against the owner of the property in a tort action and before judgment was entered thereon, the defendant therein deeded the property to his father in part for a past consideration and in part for a present consideration and that said deed was recorded on the same day but before the entry of the judgment, and that said grantee had knowledge of the rendition of said verdict but there was no proof of a conspiracy or fraud.

Held, that said deed passed good title to the grantee therein and the land was not subject to any lien in favor of the plaintiff herein and the complaint should be dismissed.

APPEAL by the plaintiff, Ella M. Boyle, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Albany on the 2d day of July, 1918, upon the decision of the court rendered after a trial at the Albany Trial Term without a jury, and as stated in the notice of appeal the appellant intends to bring up for review the decision and order of the court directing the entry of said judgment.

Smith O'Brien [*J. Sheldon Frost* of counsel], for the appellant.

Henry J. Crawford, for the respondents.

WOODWARD, J.:

The complaint alleges that the plaintiff secured a verdict in an action against the defendant Charles Blankenhorn for the sum of \$1,200 on the morning of the 15th of April, 1914, and that a judgment for \$1,315, damages and costs, was entered upon such verdict on the 16th day of April, 1914, at three thirty-two o'clock in the afternoon; that at the time of the rendition of the said verdict the defendant Charles Blankenhorn was the owner of certain real estate in the town of Beth-

lehem, Albany county; that said real estate was of the value of \$3,000, and that on the 16th day of April, 1914, "with full knowledge of the said verdict of \$1,200 against said Charles Blankenhorn, and with the intent to hinder, delay and defraud the plaintiff and prevent her from collecting her said judgment of \$1,315, or any judgment thereon, the said defendants Charles Blankenhorn and James M. Blankenhorn on April 16, 1914, entered into a conspiracy whereby the said defendant Charles Blankenhorn made, executed and delivered to the said James M. Blankenhorn a deed of said real estate, without consideration, and the same was fraudulent as against this plaintiff and prevents her from selling said real estate and realizing therefrom the amount of said judgment and that said deed was recorded in Albany County Clerk's office * * * on April 16, 1914, at 11:37 o'clock." The answer denies the material allegations, and, in addition to other matters, alleges as a defense on the part of both the material defendants that at the time of the making and delivery of the deed on the 16th day of April, 1914, the defendant Charles Blankenhorn was indebted to the defendant James M. Blankenhorn in the sum of \$1,258; that he likewise owed his attorney the sum of \$400, and that the deed was given for the purpose of paying this indebtedness, and in consideration of the defendant James M. Blankenhorn agreeing to pay said \$400 to the defendant's attorney.

Upon the trial of the action the learned court at Trial Term found the facts in favor of the defense asserted, and dismissed the complaint upon the merits. The plaintiff appeals from the judgment.

There is no dispute as to the material facts. The plaintiff secured a judgment against the defendant Charles Blankenhorn in an action in tort, and after the return of the execution unsatisfied an execution against the body of the defendant in that action was issued and Charles Blankenhorn was imprisoned in the county jail for a period of six months, and the present action was brought to impress a trust upon the property covered by the deed of April 16, 1914. The learned trial court has found that Charles Blankenhorn owed his father the sum of \$1,240; that he owed his attorney \$420, and that these sums constituted the consideration for the deed to the premises;

that the reasonable market value of the property was the sum of \$1,900, upon which there was a mortgage for \$1,450, leaving an equity of \$450, and upon these facts it was held as matter of law that the deed conveyed a good title to James M. Blankenhorn, and that the defendants were entitled to judgment for costs.

There was no proof of any conspiracy or fraud; the plaintiff makes no requests to find any facts different from those found by the learned court at Trial Term, except that it is stipulated that both the material defendants had actual knowledge of the fact that a verdict had been rendered against Charles Blankenhorn for the sum of \$1,200 at the time the deed was delivered, and the only questions for review are the conclusions of law, which seem to us to follow naturally and inevitably. The plaintiff had a verdict on the 15th day of April, 1914. She had a perfect right to enter the judgment upon that verdict on the fifteenth day of April, for it is alleged that the verdict was returned in the morning of that day. She had a right to enter it on the morning of the sixteenth day of April, and had she done so at any time prior to eleven thirty-seven o'clock of that morning her judgment would have constituted a lien on the real estate. But James M. Blankenhorn also had rights; his son owed him a considerable sum of money, and he had agreed to pay the sum of \$420 owed by the son to his attorney. The fact that a verdict had been rendered in favor of the plaintiff did not deprive him of the right to collect his debt if he could, and so long as the plaintiff had not entered her judgment no lien attached to the real estate in question. Every man is justified in paying his debts. He has a right to pay such of his creditors as he chooses, even to the extent of transferring all his property to the favored ones, provided there is no deceit or fraud. (*Commercial Bank v. Sherwood*, 162 N. Y. 310, 318, 319, and authorities there cited.) The plaintiff had it in her power to enter her judgment and secure a lien upon the premises here involved, but she had no superior rights until she had performed the conditions, and the court properly dismissed the complaint upon the merits.

The judgment appealed from should be affirmed.

Judgment unanimously affirmed, with costs.

GEORGE A. RICE, Appellant, v. CITY OF MECHANICVILLE,
Respondent.

Third Department, February 28, 1921.

Municipal corporations — accrual of cause of action against city of Mechanicville — liability denied unless notice of claim served within thirty days — action accrues when notice served.

Under the provision of the charter of the city of Mechanicville (section 116 of chapter 170 of the Laws of 1915) that the city "shall not be liable for any damages or injury sustained in consequence of defects," etc., in its streets, "unless notice in writing shall have been served upon the mayor or acting mayor within thirty days after the happening of the casualty," a cause of action does not accrue against said city within the meaning of said charter till the notice so prescribed is served.

Accordingly, since this action was commenced within six months, the time limited by said charter, after the service of the notice, the plaintiff's demurrer to the defense of the Statute of Limitations should have been sustained.

APPEAL by the plaintiff, George A. Rice, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Saratoga on the 13th day of December, 1919, overruling plaintiff's demurrer to the affirmative defense set forth in the answer.

Robert Frazier, for the appellant.

Edward C. McGinity, for the respondent.

WOODWARD, J.:

The complaint alleges facts to constitute a cause of action for negligence on the part of the defendant in the maintenance of its highways, resulting in personal injuries to the plaintiff. The defendant asserted as a defense the provisions of chapter 170 of the Laws of 1915, the charter of the defendant city, which provides in section 116 that "no action shall be commenced against said city on any duly presented claim until after the expiration of thirty days from the presentation thereof, nor shall any such action be maintained against said city which shall not have been commenced within six months after the cause of action accrued," and that the action was not

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commenced until the 12th day of October, 1918, more than six months after the happening of the accident on the 14th day of March, 1918. The plaintiff demurred to this defense as insufficient in law, and the demurrer has been overruled. The question presented upon this appeal is whether the six months' limitation began at the time of the happening of the accident on the 14th day of March, or at some later date. We are clearly of the opinion that the court has erred in overruling the demurrer.

The accident out of which this action grows occurred on the 14th day of March, 1918. On the 13th day of April, 1918, the plaintiff caused to be served the notice required by section 116 of chapter 170 of the Laws of 1915, being the charter of the defendant city. This was within thirty days after the happening of the "casualty," which is a condition precedent to the cause of action. (*Reining v. City of Buffalo*, 102 N. Y. 308; *Curry v. City of Buffalo*, 135 id. 366, 369, 370; *Winter v. City of Niagara Falls*, 190 id. 198, 203; *Carson v. Village of Dresden*, 202 id. 414, 418.) The section cited provides that the "city of Mechanicville shall not be liable for any damages or injury sustained in consequence of defects," etc., in its streets, "unless notice in writing shall have been served upon the mayor or acting mayor within thirty days after the happening of the casualty," etc. Obviously, no cause of action accrued by the mere happening of the accident. The whole matter of the maintenance of this class of actions was within the control of the Legislature. It could refuse a right of action, and it could impose any conditions precedent to the maintenance of such actions. (*Curry v. City of Buffalo*, *supra*.) In this case it has refused a right of action unless the plaintiff, within thirty days, serves a notice in accord with the requirements of the statute. During the thirty days, or up to the time of the serving of the prescribed notice, no right of action existed against the city of Mechanicville. When, on the 13th day of April, 1918, the plaintiff served the required notice; when he elected to fulfill the condition precedent (*Curry v. City of Buffalo*, *supra*, 370, and authorities there cited) the right of action accrued, and not before. The statute absolutely forbids the prosecution of any action until the proper notice has been served. It attaches to all actions whatsoever com-

ing within the specifications of the statute, and by force of the enactment this notice becomes an essential part of the cause of action, to be alleged and proved as any other material fact. It does not purport to give the city a defense dependent upon its election to use it, but expressly forbids the institution of any suit until the preliminary requirements have been complied with. (*Reining v. City of Buffalo, supra*, 310.) A fact which must be alleged and proved as a part of the cause of action must, of necessity, constitute an essential element of the cause of action, and it did not accrue until the plaintiff, within the time limited by the statute, had executed and served the notice prescribed.

If we are right in these propositions, then on the 13th day of April, 1918, a cause of action accrued to the plaintiff, but the defendant's charter further provided that "no action shall be commenced against said city on any duly presented claim until after the expiration of thirty days from the presentation thereof, nor shall any such action be maintained against said city which shall not have been commenced within six months after the cause of action accrued." Under the authorities already cited it is necessary to aver and prove that the action was not commenced until after the expiration of thirty days from the presentation of the notice, for the "plain intent of the requirement was to protect the city from the costs, trouble and annoyance of legal proceedings, unless after a full and fair opportunity to investigate and pay the claim, if deemed best, they declined to do so." (*Reining v. City of Buffalo, supra*.) This, it would seem, prevented the accruing of this particular cause of action until the lapse of thirty days from the 13th day of April, 1918, for it could not have been alleged that the necessary time had elapsed until after such thirty days, and this was essential to the statement of any cause of action against the defendant.

It is not necessary, however, in this case to go to that extent. Taking our stand at the date of the service of the first notice, concededly served on time, on the 13th day of April, 1918, and assuming the cause of action to have accrued on that date, we compute six months under the rule laid down in section 30 of the General Construction Law, and the six months' limitation expired on the 13th day of October, 1918. The

action was actually commenced on the twelfth day of October, and was clearly within the time limited by the statute. In either case, therefore, the action was commenced "within six months after the cause of action accrued," and the judgment appealed from must be reversed.

All concur.

Judgment reversed, with costs, and demurrer sustained, with costs.

SUSAN THOMPSON, Appellant, Respondent, v. THE FORT MILLER PULP AND PAPER COMPANY, Respondent, Appellant.

Third Department, February 28, 1921.

Waters and watercourses — navigability of Hudson river — dams — overflowing riparian lands — equitable relief denied — backing water into ditches on plaintiff's land technical trespass — excessive damages.

The Hudson river between Washington and Saratoga counties is a navigable stream.

In an action to recover damages for the overflowing of land alleged to have been caused by water backing into ditches on plaintiff's land as a result of a dam in the Hudson river maintained by the defendant, and to abate the dam as a public nuisance and for an injunction restraining the defendant from maintaining the dam at its present height, evidence examined, and *held*, that the maintenance of said dam was not a public nuisance; That while the dam did not raise the river enough to overflow the bank at plaintiff's land it did raise it enough to back the water into plaintiff's drainage ditches, the bottoms of which were from three to five feet below the top of the bank, and a technical trespass was thereby committed from which the plaintiff suffered some damage.

The privilege accorded to plaintiff to apply at any time at the foot of the judgment for an injunction, upon showing that the ends of justice require it, was all the relief that the plaintiff was entitled to in that regard; it will serve to prevent any adverse or prescriptive right ripening in the defendant.

On all the evidence, *held*, that an award of damages of \$2,000 was excessive and should be reduced to \$150.

CROSS-APPEALS by the parties, Susan Thompson and The Fort Miller Pulp and Paper Company, from a judgment of

the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Washington on the 7th day of April, 1920, upon the decision of the court rendered after a trial without a jury at a Trial Term of the Supreme Court.

Rogers & Sawyer [Erskine C. Rogers of counsel], for the plaintiff.

William S. Ostrander, for the defendant.

KILEY, J.:

The *locus in quo* of this litigation is in Washington and Saratoga counties in this State, with the Hudson river separating the main parts of the properties involved. The action was commenced in June, 1912. It was tried before the court without a jury and the trial was finished some six or seven years later. As both parties have appealed, for convenience the parties will be referred to as plaintiff and defendant. The defendant is a domestic corporation, and owns and operates a pulp and paper mill at or near Fort Miller, N. Y. This plant is located on the east bank of the Hudson river, at which point it has a dam extending across the river, by means of which dam it impedes the flow of the water, and confines it, releasing it to turn its wheels, thus creating the power used. The river runs practically north and south through and between those properties. Defendant owns real estate on each side of the river against which the ends of the dam abut. The lands on the east side of the river were acquired by defendant and its predecessors some years before the opposite lands on the west side of the river. As early as 1804 defendant's predecessors obtained the right from the State to erect on the east side of the river a wing dam, viz., a dam extending out into the river but not beyond its center line; such dam was built and maintained for several years prior to the year 1882. In the month of July, 1882, the predecessors of defendant acquired the land on the west or opposite side of the river by deed, in and by which rights, other than the fee, were attempted to be conveyed, and were conveyed so far as the grantor had such rights. The recital in the deed for that purpose reads as follows: "The right to build a dam across

said river or any part of it opposite to said farm and to abut the same against the west bank of said river on said farm and to keep and maintain the same there forever." After acquiring the last-mentioned lands, the predecessors of the defendant extended its dam from the east toward the west to within twenty or thirty feet of the west shore. Defendant claims to own the bed of the river between the east and west shore to the extent of its shore line opposite its real property on either side. A portion of the claim is based, so far as the east half of said river is concerned, on the "Schuyler Patent," granted by King George II of England in 1740; so far as the west half of said river is concerned, it is based on the "Kayaderosseras Patent," granted by Queen Anne in 1708. In addition the defendant claims that as this is above tide water, its rights as riparian owner carry it to the thread (center) of the stream. The trial court found that defendant had not acquired title under either theory. (See 111 Misc. Rep. 477.) For such holding there is authority aplenty. (*Fulton Light, H. & P. Co. v. State of New York*, 200 N. Y. 400, and cases cited.) In *Danes v. State of New York* (219 N. Y. 67) at page 72 of the opinion the court says: "The law of New York, as a colony and as a State, has consistently declared through legislative and judicial decisions that the rule that the owner of the contiguous bank of a non-tidal navigable river owns to its center, is not, for certain exceptional reasons, applicable to the Mohawk river and parts of the Hudson river." It is not held here that the beds of those rivers are not inalienable; I think they are; but the decision is not necessary to determine the issue involved here. So without disturbing the finding of the court below in that regard, attention to the issues as framed by the pleadings and as finally presented by the evidence will be had. A little over a mile north of this dam, as it is now and as it was in 1882, is situate plaintiff's farm of about two hundred acres, about forty acres of which is an island in the Hudson river, the lower part of which is opposite the north part of said farm. The plaintiff obtained this farm from her husband with whom she had resided upon this farm since 1867; he died in 1895. The trial court found, and upon sufficient evidence, that the dam, as constructed and maintained, down to 1894, gave no

cause for complaint to other riparian owners. In 1894 and 1895 the defendant repaired its whole dam and reconstructed that portion covered by its purchase of the lands on the westerly side and whatever other rights it acquired by that purchase. The court has found upon evidence sufficient to sustain the finding that the gap of twenty or thirty feet at the extreme west end was closed by a substantial structure and that said dam west of the thread of the river was raised eighteen inches above its former height, eighteen or nineteen years after the plaintiff brought this action. In and by her complaint she alleges that the land was used and occupied by her for agricultural purposes; that erected thereon were a dwelling house and necessary farm buildings; that the dam, as above described, was wrongfully maintained without the consent of herself or her predecessors in title; that as so maintained the dam set back the waters of the river upon about thirty-five acres of her farm and rendered it damp, wet, soggy, marshy and "totally unfit for cultivation;" that dirt and debris were spread over the land; that pools of stagnant water were caused to stand upon the land and around the buildings; that an unsanitary condition was thereby created; that fences were injured, and ditches upon the land were filled and the banks of such ditches were washed out; that the roots of trees were washed bare and the trees toppled and fell and were lost; that her loss in annual rental value was \$500; and that the freehold had been damaged to the extent of \$1,000; that in the river she owned a valuable dam site, appropriated by the State, which if it was not for the wrongful raising of defendant's dam, would have netted her more money from the State of New York when it made such appropriation; that the Hudson river is a public highway, and finally that the maintenance of said dam by the defendant, as maintained, in the manner complained of by plaintiff, constituted and does still constitute a public nuisance. Defendant denies plaintiff's allegations of damage; and alleges that it has maintained said dam, effective as to backing up water, for the past forty years before the commencement of this action; that for more than twenty years this defendant and its predecessors in title openly and notoriously maintained the dam at the point and on the part complained of (the western

part) at an equal or greater height than at that time; denies that it maintains a public nuisance, and that the river is a public highway. Upon the issue thus made, plaintiff demands judgment for \$4,000 damage, that the nuisance as alleged be abated, and that plaintiff have an injunction preventing the maintenance of the dam at its present elevation. The court held that the Hudson river was navigable, a public highway; such finding is sustained by the facts and the law. (*Danes v. State of New York*, 219 N. Y. 67, and cases cited.) I am aware that an apparently different holding can be found. (*Morgan v. King*, 35 N. Y. 454.) In that case the question in dispute related to a part of the river that had not been used as a public highway nor so designated; the Hudson had been so used and permitted by the State. The weight of authority is to the effect that it is a public highway. The holding either way does not affect the rights of the parties as I conceive them to be and as they were finally submitted and determined. (*United P. B. Co. v. Iroquois P. & P. Co.*, 226 N. Y. 39.) In *Melker v. City of New York* (190 N. Y. 481) at page 488 of the opinion, the court says: "We think that each case must depend on its own facts for classification as a nuisance at law, or in fact, or neither." The trial court did not find that the maintenance of the dam was a public nuisance either in law or fact. Trespass against plaintiff's rights was found; if she suffered any of the damages alleged, she was entitled to such finding. (*Heeg v. Licht*, 80 N. Y. 580.) Plaintiff was not entitled to the more harsh finding. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.) The trial court refused a permanent injunction. That is equitable relief. The equitable relief sought by plaintiff in this action is based upon her alleged legal cause of action. That she had a cause of action for something was properly found, viz., for damage. That the amount is on the wrong basis, and excessive, I shall show presently. Having properly found that plaintiff suffered some damage, which was a technical trespass, it does not follow that an injunction should issue. (*McCann v. Chasm Power Co.*, 211 N. Y. 301.) The privilege accorded plaintiff, to apply at any time at the foot of the judgment, for an injunction, upon showing that the ends of justice required it, was all the relief plaintiff was entitled to in that regard; it will serve to prevent any adverse

or prescriptive right ripening in the defendant. The opinion of the court below (111 Misc. Rep. 485) says that the damage to the island was covered by an appropriation from the State and does not consider it as an element entering into his award in favor of the plaintiff. As aforesaid this action was commenced in June, 1912. Judgment was entered in April, 1920. Seven years and nine months between the two dates. Add to these figures six years prior to the commencement of the action and you have thirteen years and nine months. In considering the only question of any importance left for consideration, it is well to recall just what the trial court did in that regard. It found as to damage to the freehold as follows: "12. That the permanent depreciation in value to plaintiff's said farm from the effects of the dam if continued at its present height is \$2000." In his opinion the learned judge says this finding is not to be considered effective, should either party elect to disregard it; an examination of the judgment shows that the plaintiff elected to disregard it, and of course the defendant had no intention to take advantage of such finding and could not do so in absence of plaintiff's acquiescence. The judgment is based on the difference of rental value, \$1,400, as found by the court. After the eliminations hereinbefore referred to and considered, the rights of these parties are narrowed down to their respective rights as riparian owners. (*United P. B. Co. v. Iroquois P. & P. Co.*, 226 N. Y. 38.) Starting with this premise a consideration of the several parties, their location and situation is necessary. We are referred to no rights given to or acquired by the defendant to overflow any lands that it does not own. The same is true as to the plaintiff. The title to the bed of the stream being in the State, the water flowing over that bed is held by the State for the use of the people as a whole, equally, with the exception that none can land on the land of the riparian owner without his, her or its consent. (*Gould v. Hudson River R. R. Co.*, 6 N. Y. 522.) It follows that neither of these parties had or has the right to invade the rights of the other. The plaintiff's cause of action here cannot be based upon any other consideration. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.) The evidence discloses that this farm lies on the west bank of the Hudson river; that for a consider-

able distance it borders on the river; that the fall in the river from the part of the farm involved here to the dam is about five feet; that the area involved is about thirty-five acres; these thirty-five acres are back of the buildings which are along the river bank; the bank at the edge of the water, at its natural flow, is about four or five feet above the water. The land from the edge or bank of the river slopes back toward the west to a decrease in the bank elevation at the brink of about one to two feet; it reaches its lowest level about the center of this thirty-five acre piece. Immediately west of the aforesaid plot of land the land commences to ascend toward the west and north. Before the times complained of herein and now there was and is a main ditch on the north bounds of the farm discharging into the Hudson river; it started from about the center of the alleged affected area. To the south there was and is another ditch, running for several hundred feet along the southern boundary of the farm; it crosses the corner of the Austin farm, crosses the road in a culvert, and discharges through a ditch about three feet deep into the river. This ditch starts from the same point as the one on the northern boundary. This thirty-five-acre plot, which it is claimed is destroyed, is gridironed with ditches; they empty into these main ditches. There are springs upon this piece of land, and its general description is that it is and always was low, much of the time wet, and of marsh formation. These ditches were all dug before there was any complaint or reason for complaint about the overflow from the dam in the river. Were they dug and maintained in anticipation that at some future time a dam would be built or raised that would impede the flow of the river so that it would back up onto the land? It seems to me from this evidence that similar conditions to what is now claimed existed before 1894. The elevation at the dam is 115; at the bottom the Austin ditch, viz., the one draining the farm from the south, is 117; in feet and inches, the bottom of the southern ditch is two and one-half feet above the crest of the dam; in order to overflow the banks of the river on this farm the water would have to be some eight or nine feet over the crest. The river is nine hundred feet wide opposite the farm, and seven hundred feet at the dam. Because of the peculiar formation of the river above the dam, a raise of a foot

at the dam would not effect a raise of over four to six inches in the wide expanse of water opposite the farm. The claim that the water ever overflowed the banks, except in extreme freshets, is not sustained by the evidence; it is obvious that when the river rises from natural causes the dam has no effect on it at its present elevation. It is proven and practically conceded that the only way the plaintiff's land is overflowed by water from the river is through the ditches, the bottom of which are from three to five feet below the surface of the bank. The defendant is consequently charged, in this judgment, with damage it is claimed comes from water let into the ditches dug and maintained or caused or permitted to be by the plaintiff and her predecessors. More than that, defendant is charged with all of the damage it is claimed is done by the water upon this land, from every source, as if it all came through the ditch from the river. Plaintiff's son-in-law swore that the annual rental value of the farm in its present condition was \$500, and without the condition alleged to have been created by the raising of the dam, \$750. No other evidence was given. We are not left in doubt as to how he computes the damage. On cross-examination he was asked these questions: "Q. Regardless of how the water came to be backed in there, according to your statements. In other words, you assumed that whatever water came on there was put back there by the dam, didn't you? A. Yes, sir. The Court: That is, so far as you are testifying on the question of damages? A. Yes, sir." The evidence leads to the irresistible conclusion that only a very small portion of the water that is seen at times upon the land comes from the river and main ditches. The evidence shows that when the owner occupied and worked this farm it was a good producer; that he kept the ditches open, and that now they are, more or less, filled up; that the farm for years has been run by hired men, renters, or on shares. It is a matter of common knowledge that river bottoms (land along the river) are always low and consequently damp; that the forests of the Adirondacks have been much thinned out, so that the snows are not held and slowly melted; they are now exposed to the sun, melt rapidly and the waters come down. They reach this plot, prepared by these ditches to receive them; those are depre-

sions in the surface of this affected piece of land; water lodging there has to soak and evaporate. The plaintiff's position is that as to the water in the ditch from the river, *first*, it stops other water, if any there, from flowing out; *second*, that the river water, by means of capillary attraction, is carried to the utmost boundaries of the thirty-five acres and deposited and left in the soil. Capillary attraction is not thus discriminatory; it makes no election between the water from the river and that from the hills and from the springs on the land in question. The evidence leads to the conclusion that water from the two ditches would not go upon the land until a considerable body was there from other sources. The damage from the river water through the ditches, under the conditions disclosed by this evidence, is infinitesimal. The plaintiff has the right to exercise her riparian rights for drainage so long as she does not interfere with the rights of the public or invade the shore line or riparian rights of others. The defendant has the same rights. Where it is lame here is that it lands the water that it sets back upon the land of another, in other words, invades her shore line, her riparian possession. For that it is liable; the amount is so small that it almost defies computation. Ten dollars a year will amply cover this damage for the time involved as found in the judgment. The amount of damage should be \$150.

Judgment accordingly with disapproval of the findings of fact and conclusions of law contrary to this opinion.

All concur.

Judgment as to damages reversed as excessive, and new trial granted, with costs to appellant to abide event, unless the plaintiff within twenty days stipulates to reduce the damages to \$150; upon such stipulation the judgment is so modified and as modified affirmed, without costs. Judgment so far as it denies the injunction affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DURHAM REALTY CORPORATION, Appellant, v. EDWARD B. LA FETRA, a Justice of the City Court of the City of New York, Respondent.

First Department, December 24, 1920.

Landlord and tenant — mandamus compelling issuance of precept in summary proceedings — statutes — sufficiency of emergency message by Governor certifying to necessity for immediate passage of bill — examination of official records of Legislature to determine validity of statute — effect of certification by Secretary of State to passage of act — impeaching legislative records by extrinsic evidence.

Mandamus is the appropriate remedy to compel a justice of the City Court of the City of New York to issue a precept in summary proceedings for the removal of a tenant.

The fact that the Governor's emergency message certifying to the necessity for the immediate passage of chapter 942 of the Laws of 1920, which was sent after the bill had been amended so as to limit its application to certain cities, referred to the title as it originally stood, is immaterial where the reference to the number and reprint number of the bill clearly indicated that the act in question was the one intended.

As a general rule it is not permissible to examine the official records of legislative bodies in passing on the validity of a statute, but where the validity of a statute depends upon a particular thing being shown or not shown by the official journals, it is proper to examine them.

The certification by the Secretary of State that a statute was duly enacted does not preclude inquiry with respect to whether the provisions of article 3, section 15, of the State Constitution, requiring a bill to be printed and on the desks of the members of the Legislature for three days before passage unless the Governor shall have certified by an emergency message to the necessity for immediate passage, have been complied with.

Parol evidence cannot be received to impeach the official certification by the presiding officers of the Legislature or the journals of the respective houses as to the passage of a bill; therefore, the affidavits of the petitioner tending to impeach the official journals could not be considered in determining whether chapter 942 of the Laws of 1920 was duly enacted.

APPEAL by the relator, Durham Realty Corporation, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of

New York on the 13th day of December, 1920, denying relator's motion for a peremptory writ of mandamus.

George L. Ingraham of counsel [*John M. Stoddard* and *Alexander C. MacNulty* with him on the brief], for the appellant.

Robert P. Beyer, Deputy Attorney-General, for the respondent.

William D. Guthrie and *Julius Henry Cohen*, Special Deputy Attorneys-General, for the Attorney-General.

Elmer G. Sammis and *Bernard Hershkopf*, for the Joint Legislative Committee on Housing, as *amici curiæ*.

LAUGHLIN, J.:

On the 20th day of October, 1920, the relator presented a petition in due form to the City Court of the City of New York showing that it was the owner of an apartment house known as 490 West End avenue, in the borough of Manhattan, New York; that on or about the 28th day of May, 1917, by a lease in writing it let to one Weil an apartment in said building for the term of three years ending September 30, 1920; that the tenant was holding over after the expiration of the term without its permission; that the proceeding was not one of those authorized or provided for in subdivision 1-a of section 2231 of the Code of Civil Procedure, as added by chapter 942 of the Laws of 1920, and that it made a formal application in writing to said court for the issuance of a precept for the removal of the tenant, which was denied in writing by the defendant, who is a justice of the said court, on the ground that the issuance of the precept was not authorized by the statute. The motion was for a mandamus requiring the issuance of a precept. Mandamus in such case is the appropriate remedy. (*People ex rel. Lewis v. Fowler*, 229 N. Y. 84.) The contentions here made with respect to the invalidity of the statute withdrawing the remedy of summary proceeding and of the right of the relator to the remedy as it existed when the contract was made are answered by the opinion in *People*

ex rel. Brixton Operating Corporation v. La Fetra (194 App. Div. 523), argued and decided herewith.

The appellant, however, makes a further point that said chapter 942, withdrawing the summary proceeding remedy with respect to tenants holding over after the expiration of their term, with certain exceptions not here in point, was not passed in the manner provided by article 3, section 15, of the Constitution, which provides as follows: "No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the State."

Concededly the bill was not printed and upon the desks of the members in its final form three calendar legislative days prior to its final passage. It is claimed that the Governor did not fully certify to the necessity of its immediate passage so as to warrant its passage without its having been so printed and upon the desks of the members. Its authenticity was duly certified by the presiding officer of each house and it was signed by the Governor, and appears in the official edition of the laws.

The appellant in support of this claim did not rely on the bill itself and the official certification thereof and official journals of the two houses but attempted by affidavits to impeach the official journals.

Chapter 942 originated in the Senate where it was introduced on the twentieth of September and became known as Senate Bill No. 25 and as printed was given the introductory number 25 and the printed number 25. It was originally intended to apply to all cities of the first class and to cities in a county adjoining and the title of the bill so provided, and it was designed to repeal chapter 137 of the Laws of 1920 which applied to the same cities. The bill was evidently referred to the committee on affairs of cities. The journal of the Senate* shows that on the twenty-fourth of September that committee was discharged from further consideration of the bill; that the

* See vol. 2, Appendix II, pp. 90-92.— [REP.]

rules were suspended and the bill was ordered to a third reading; that when it was reached on the order of third reading, it was recommitted to the committee with instructions to amend and report it forthwith to be reprinted as amended and restored to its place on the order of third reading, and that the amendment related to the title, which was changed so as to limit it to cities of a population of 1,000,000 or more and cities in a county adjoining such a city. The effect of that was to except from the bill the cities of Buffalo and Rochester. The Senate journal further shows that the committee reported the bill amended as directed and that it was ordered reprinted and placed on the order of third reading; that a message from the Governor addressed "To the Legislature" in the form prescribed by said provisions of the Constitution, was then received at the hands of his secretary and read and incorporated in the journal; that the Governor's message recited that, it appearing to his satisfaction that the public interest required it, he certified "to the necessity of the immediate passage of Senate bill (Int. No. 25, Printed No. 25)," and he quoted the title of the bill as originally introduced, followed by the words "as amended." The bill as so amended was then passed and the clerk was directed to deliver the bill to the Assembly and request concurrence therein. It evidently was then again passed by the Senate, for its journal* shows that it was returned by the Assembly with a message to the effect that it was concurred in by the Assembly with two amendments set forth in full, the effect of which was to require the petitioner, who desired possession for the purpose of demolishing the premises with the intention of constructing a new building, to show that such desire was in good faith, and to extend the bill, in so far as it authorized landlords to regain possession of their property, to a proceeding to recover possession where the building had been sold in good faith to a cooperative ownership corporation and was to be occupied personally by the stockholders. The journal of the Assembly† shows that the bill was received from the Senate for concurrence, and the title of the bill as so amended is set forth and

* See vol. 2, Appendix II, pp. 100-102.—[REp.]

† See vol. 4, Appendix II, pp. 97-99.—[REp.]

the numbers by which it had then come to be known, namely, "(No. 60, Rec. No. 21);" that it then had a first reading in the Assembly and was amended as already stated, and was then read a second time and ordered to a third reading; that thereupon a message from the Governor, in due form as required by these provisions of the Constitution, addressed "To the Legislature," was received, reciting that, it appearing to his satisfaction that the public interest required it, he hereby certified to the necessity of the immediate passage of "Senate bill (Int. No. 25, Assembly Reprint No. 68, Printed No. 25)," but quoted the original title of the bill; that the bill as thus amended by the Assembly thereupon had its third reading and was duly passed. Although the message of the Governor quoted the original title of the bill, it is perfectly plain from the specification in the message that it related to the bill bearing the reprint number 68, that the message referred to the bill as amended by the Senate and as it was then pending in the Assembly. It further appears by the journal of the Assembly* that the Speaker, on putting the question whether the House would agree to the final passage of the bill, stated that the necessity for its immediate passage had been certified by the Governor, and that after its final passage it was ordered returned to the Senate with a message that the Assembly had concurred in its passage with said amendments, and that thereafter* the Assembly received the bill from the Senate entitled "(No. 60, Assembly Reprint No. 68, Rec. No. 21)," giving the title as originally amended in the Senate, which was merely a notification to the Assembly that the Senate had concurred, for the bill was thereupon ordered returned to the Senate. It further appears from the journal of the Senate† that the Senate, on receipt of the bill from the Assembly with said amendments the first time, duly concurred therein, and that thereupon another message was received from the Governor in due form under the Constitution, addressed "To the Legislature," which recited that, it appearing to his satisfaction that the public interest required it, he certified "to the necessity of the immediate passage of Senate

* See vol. 4, Appendix II, pp. 99, 114.—[R.E.P.]

† See vol. 2, Appendix II, pp. 100-102.—[R.E.P.]

bill (Int. No. 25, Printed No. 60, Assembly Reprint No. 68)," giving the title as amended by the Senate, confining it to cities having a population of 1,000,000 or more and cities in a county adjoining, and that thereupon the bill, as so amended by the Assembly, had its third reading and was put on final passage by the President of the Senate who, in putting the question, stated that the Governor had certified to the necessity of the immediate passage of the bill, and it was thereupon passed. It thus appears that the journal of each house shows that the members thereof understood that the Governor was certifying to the necessity of the immediate passage of the bill in its amended form, and that he so intended is evidenced by his reference to the Assembly reprint of the bill, which included the amendments and evidently was the final reprint showing the bill in the precise form in which it was enacted, and by his approval thereof. At most, there was an error in the original message with respect to the description of the title of the bill as it was then before the Senate, but that the Governor must have understood that the title had been amended is shown by his designation of it by a number which identified the bill as it then existed. In addition to this record evidence, conflicting affidavits were presented with respect to the number of messages sent to the Legislature by the Governor concerning this bill, and with respect to the action of the Senate and Assembly on the bill before and after the receipt of such messages. On the part of the appellant, these affidavits tend to impeach the records to which reference has been made, and the affidavits on the part of the respondent support the records and plainly show that the bill was duly passed. In referring to this evidence *dehors* the record, we do not wish to be understood as indicating an opinion that a statute may be impeached by such evidence. The general rule is that it is not even competent to examine the official records of the legislative bodies in passing upon the validity of a statute (*Hunt v. Van Alstyne*, 25 Wend. 605; *Field v. Clark*, 143 U. S. 649; *Ritchie v. Richards*, 14 Utah, 345; *People ex rel. Purdy v. Commissioners of Highways of Marlborough*, 54 N. Y. 276; *McCulloch v. State*, 11 Ind. 424; *Miller v. State*, 3 Ohio St. 475); but where the validity of a statute depends upon a particular thing being shown or

not shown by the official journals, it is proper to examine them. (*Happel v. Brethauer*, 70 Ill. 166; *Wilkes County v. Coler*, 180 U. S. 506; *Bank v. Commissioners*, 116 N. C. 214; *People v. Petrea*, 92 N. Y. 128. See, also, *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377.) Our attention has not been drawn to any statute requiring that the certification of the passage of a bill shall show whether or not it was printed and on the desks of the members in its final form for the requisite period before it was passed, or whether that requirement was dispensed with by an emergency message from the Governor. It may well be that such certification, if required to be made by the presiding officers of the respective houses, could not be impeached even by the official records; but if there be no such requirement, the mere fact that the Secretary of State has certified that the statute was duly enacted does not necessarily, I think, preclude an inquiry with respect to whether these constitutional provisions were complied with. The official journals may be consulted in support of a statute, but we are of opinion that in no event could parol evidence be received to impeach the official certification by the presiding officers or the journals of the respective houses, for that is not permitted even in jurisdictions where recourse may be had to the official journals. (*Taylor v. Beckham*, 108 Ky. 278; *State ex rel. Herron v. Smith*, 44 Ohio St. 348; *McCulloch v. State*, *supra*; *Eld v. Gorham*, 20 Conn. 8; *Wise v. Bigger*, 79 Va. 269; *People v. Hatch*, 33 Ill. 9.)

The affidavits tending to impeach the official journals must, therefore, be excluded from consideration. We do not deem it necessary to examine the statutes, which are not cited, with respect to the certification of the passage of laws, or to decide whether the official journals may be consulted on this point to annul an enactment, for in the case at bar those journals do not tend to show a non-compliance with the provisions of the Constitution. It will be observed that the Constitution does not prescribe how the bill shall be identified in the emergency certificate, or that the message shall be spread upon the journals of the Assembly and the Senate, or that a duplicate shall be delivered to each house. If these constitutional provisions required a construction that the Legislature was limited to the passage of the bill in the precise form

in which it was at the moment it received the emergency message from the Governor, that is sufficiently shown here by the official journals; but I think that would be too narrow a construction to place on the Constitution and that, at least, amendments not materially affecting the purpose and object of the bill may be made after the receipt of the message from the Governor. It is manifest that the subsequent approval of the bill by the Governor is entitled to great weight as showing that the bill as it came to him is the bill the immediate passage of which he deemed required by the public interest. The requirement of the emergency message is to dispense with and obviate the delay otherwise required to prevent hasty legislation. It appears that this constitutional amendment as originally proposed did not contain the words requiring that the bill should be upon the desks of the members "in its final form," and that they were added by amendment. (Revised Record of the Constitutional Convention of 1894, vol. 1, pp. 887-917.) It will be observed that the constitutional provisions with reference to the emergency message are directed to the bill, and that the provisions of the Constitution recognize a distinction between the *bill* and the *bill in its final form*. It is regarded as the same bill from the time of its introduction until it passes. If it were held that there could be no change in the bill, even to correct a typographical error or to clarify its meaning, after the receipt of the Governor's message, the validity of all such legislation would be endangered by an inquiry with respect to the time of the receipt of the message and the precise form of the bill at that time. If that were intended, the Constitution would have required that a record of those matters should be made and preserved, but it does not.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ.,
concur.

Order affirmed, with ten dollars costs and disbursements.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of GRACE DELSO and Others, Respondents, for Compensation under the Workmen's Compensation Law on Account of the Death of PETER DELSO, v. CRUCIBLE STEEL COMPANY OF AMERICA, Employer and Self-Insurer, Appellant.

Third Department, February 28, 1921.

Workmen's Compensation Law — accidental injury or death — pneumonia incited by injury to left side of body — when Appellate Division will not interfere with finding of State Industrial Commission.

While an employee of a steel company was working on a machine for reeling and drawing wire, his hand slipped and the left side of his body came in contact with a frame or guard and he died four days after the injury of "lobar pneumonia" with "contributory myocarditis." *Held*, that there was competent evidence that the injury was the inciting cause of the pneumonia.

As there were many circumstances corroborating the opinion of the experts who traced the pneumonia to the injury, the Appellate Division is not at liberty to interfere with the finding of the State Industrial Commission that the injury was the cause of the pneumonia.

APPEAL by the defendant, Crucible Steel Company of America, from a decision and award of the State Industrial Commission, made on the 10th day of December, 1919.

Bond, Schoeneck & King [*Edward Schoeneck* of counsel], for the appellant.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, and *Bernard L. Shientag* of counsel], for the respondent State Industrial Commission.

John P. Hennessey, for the claimants, respondents.

VAN KIRK, J.:

Peter Delso was employed by the Crucible Steel Company of America in its plant in Syracuse. On Wednesday, Sep-

tember 11, 1918, he was working on a machine for reeling and drawing wire. His hands were slippery with oil; his hand slipped and the left side of his body came in contact with a frame or guard connected with a spool on which the wire was wound. Exhibit "3A" shows a man in the position in which Peter Delso stood just before and at the time of his injury, and on Exhibit "A" there is a letter "A" marked on the frame against which his body struck. A man who saw the accident says that his body fell about six inches. Considering the testimony and the photograph and the fact that the man stood firmly on his feet, it seems plain that the force of the blow which he received was due to the amount of strain upon his arm when his hand slipped, and that the force of the blow would be greater the nearer his body was to the frame against which it struck when his hand slipped. When he straightened up, he swore, but said little, if anything, of his injury that afternoon. His work, however, was not active, and much of the time he remained seated. The next day, Thursday, he complained of sickness and of the injury, was sent for first aid, ate no lunch, went to his home and soon to his bed. On Saturday a physician was called, who diagnosed the case as bronchitis. On Sunday the doctor was again called and pronounced the case pneumonia. In the afternoon a consultation of physicians was had; he died Sunday evening at nine o'clock, four days after the injury. The death certificate states the cause of death to be "lobar pneumonia," with "contributory myocarditis."

In the room in which Delso worked there were strong fumes, which irritated the throat. Prior to the injury Delso coughed some, suffered some from asthma, but was otherwise strong and was able to work regularly. Much was made of a dispute whether the pneumonia was on the same side as the injury. The attending physician, Dr. Van Lengen, was a very unsatisfactory witness. His record was incomplete. In testifying he depended upon his memory. The injury was upon the left side. At one time the attending physician says the pneumonia was upon the right side and again it was on the same side as the injury. It appears that it is very difficult to determine whether pneumonia is affecting both sides, or only one.

Experts were examined, two of whom stated that in their opinion the injury was the inciting cause of the pneumonia, and other experts, called for the employer, testified to the contrary.

The employer claimed that the "influenza" was the cause of death. There was a military camp within a little more than one and a half miles from the employer's plant, where the influenza developed and later there were many cases in the city. But the pneumonia, from which Peter Delso died, was not traced with any definiteness to the influenza epidemic.

A reading of all the evidence in the case leaves in the mind a strain of uncertainty; but there was competent evidence that the injury was the inciting cause of the pneumonia; there was a sudden development and a quick termination in the progress of the disease after the injury. There are many circumstances corroborating the opinion of those experts who trace the pneumonia to the injury. The Commission has found that the injury was the cause of the pneumonia. This court is not at liberty, under the evidence and the rules which govern in these cases, to interfere with this finding.

In its opinion the Commission states that "the decision of the Commission now arrived at is in no way influenced or affected by any observations made by the deputy commissioner as the result of his personal inspection," made by him at the plant, without the presence of the employer. (21 State Dept. Rep. 590.)

The award of the Commission should be affirmed.

Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of NICHOLAS NEWHAM, Respondent, for Compensation under the Workmen's Compensation Law, v. CHILE EXPLORATION COMPANY, Employer and Self-Insurer, Appellant.

Third Department, February 28, 1921.

Workmen's Compensation Law — jurisdiction of subject-matter may not be given by consent and may be raised first on appeal — when expert stevedore employed by shipper to supervise loading of cargo not engaged in maritime employment — test as to whether employee is in maritime employment.

The question as to whether jurisdiction of the subject-matter is in the State Industrial Commission or in the admiralty courts may not be determined by the parties and may be raised first on appeal.

An expert stevedore, employed by a shipper to observe whether the cargo was safely and properly stowed in a steamship, and to report to his employer what he observed in these respects, who was injured while aiding an employee of a stevedoring company, employed by the captain of the steamship, who was having difficulty with a load on his truck on the dock, was not in a maritime employment nor was he under a maritime contract.

The true test as to whether or not an employee is in a maritime employment or under a maritime contract is the subject-matter of the contract — the nature and character of the work to be done.

JOHN M. KELLOGG, P. J., dissents.

APPEAL by the defendant, Chile Exploration Company, from an award of the State Industrial Commission, made on or about the 27th day of February, 1920.

Carroll A. Wilson [*George O. Redington* and *R. C. Klugescheid* of counsel], for the appellant.

Charles D. Newton, Attorney-General [*Bernard L. Shientag* of counsel], for the respondent State Industrial Commission.

Wood, Molloy & France [*Francis X. Hennessy* of counsel], for the claimant, respondent.

VAN KIRK, J.:

The Chile Exploration Company had engaged a portion of the space in the steamship *Maipo* to carry freight from New York to Valparaiso and other ports on the west coast of South America. The ship belonged to the government of Chile. The captain of the ship was given the sole right to employ the stevedore. The claimant Newham is and was an expert stevedore. Arne & Co. did checking and tallying of cargoes on the dock for a number of stevedoring companies. Auditore & Co. usually did the stevedoring work for the Chile Exploration Company. The claimant applied to Auditore & Co. for work on this ship. Mr. Edwards, of Arne & Co., was in the office at the time. He conferred with Mr. Talbot, who had charge of affairs for the Chile Exploration Company, and the claimant was thereupon put to work, Mr. Edwards giving him a note to the chief clerk of Arne & Co. on the dock.

The checking and tallying of goods for a cargo is no part of the stevedoring. Checking and tallying is checking the freight, as it is delivered at the dock from trucks or lighters, inspecting the packing and noting the number and quantity of the several parcels or kinds of freight. The stevedoring work was being done by Patane & Co., employed by the captain of the ship. Auditore & Co., under the direction of Mr. Edwards, acting for Mr. Talbot, advanced his wages to Newham. It does not clearly appear to whom Auditore & Co. charged these advancements.

The claimant was not employed as a stevedore, nor as a checker or tallier. The Chile Exploration Company, because it had not employed the stevedores and because it wanted its cargo space well filled and the property well stowed to protect it against injury, desired an experienced stevedore to watch the work as it was done. Claimant was given no authority to give orders on the boat, or to take part in the stowing of the cargo; he was simply there to observe and report to the shipper, so that, if the cargo was not being properly stowed, the shipper could take it up with the captain of the boat. As to the employment Mr. Talbot says: "The stevedores doing the work, we didn't know how they did the work and we wanted the stuff looked out for, to see that none of the stuff was broken up or not properly placed in the steamer,

and I wanted somebody there all the time to have a report given to me if goods were broken, or not properly stowed, or improperly placed in the steamer, and I wanted somebody there all the time that could report it to me so I could take it up with the captain of the steamer." And again: "We wanted him to oversee the work done on the steamer, in case anything was not going right that he could report it to Mr. Edwards and Mr. Edwards could report it to us. * * * You see he [Newham] couldn't say anything on the steamer; it would have to be taken up by me." Still again: "Q. Why was it necessary to have an expert stevedore doing that? A. Because it was better to have a man of that sort because he would know better how to stow the stuff, for instance see that they weren't putting light cases on bottom and heavy ones on top, because then they would break, and he would see that right away and correct it." Mr. Edwards testifies that when he hired Newham he told him "not to interfere with the storage of the ship by the other stevedores, unless he saw something wrong, and if he did to report to me and then I would report to Mr. Talbot." Mr. Edwards has stated that Newham had some further duty in the line of helping the stevedores, but Edwards was not the agent of the employer. The Commission has accepted, we think justifiably, the testimony of Mr. Talbot on this subject.

The claimant gives this account of the manner of his injury: The foreman of the stevedoring company "asked me to shift the lighters for him,—will I 'be so kind as to move the lighters out of the way?'; and I told him, 'Sure.' I started up the dock—I was going up the dock—a fellow was coming down with a hand truck. Of course, he was standing there with a piece of iron, and he was right across the dock, and I started—I said to him, 'What's the matter, John?' He says, 'Kindly come aboard; it's too heavy.' I said, 'Hold your hands on the handles of the truck and when I get around I will straighten it out for you.' He was sitting on the truck and freight on the center and freight on the side of the dock, and I went to go around the truck where the iron was, and just as I got around to the end of the plate and started to straighten it up he let go his hand." The piece of iron slid across and struck his foot. Some time after the foot was amputated. It is not

disputed that the amputation necessarily resulted from the injury received. The appellant claims that the evidence does not sufficiently show that the Chile Exploration Company was the claimant's employer; that Newham was employed by Mr. Talbot for the Chile Exploration Company through Mr. Edwards. We find sufficient evidence to support the finding of the Commission in this respect.

We turn then to the principal question on this appeal; whether jurisdiction of the subject-matter is in the State Industrial Commission, or in the admiralty courts. The claimant insists that this question is not in this court, because of an agreement with the Industrial Commission to the benefit of the claimant, made under these circumstances: The award had been made against Arne & Co. as the employer. Later that award was changed and the Chile Exploration Company was held to be the employer. That company, however, had not appeared at any hearing and had had no notice of the hearing at which the adjudication against it was made. It applied for a rehearing, and an agreement was made that the weekly payments should be regularly advanced to Newham during the pendency of the litigation, and that whichever company was finally held to be liable as employer should reimburse the party who had made the advancements. It was understood and agreed between the Chile Exploration Company and the Commission that no question should be raised upon the appeal excepting who was the employer. At that time the question of jurisdiction was not thought of and was not introduced into the case until the decision of the United States Supreme Court in *Knickerbocker Ice Co. v. Stewart* (253 U. S. 149).

The position of the claimant in this respect cannot be sustained. There is a clear distinction between the privilege of appealing and the jurisdiction of the court over the subject-matter in dispute. A party may waive or contract away his right to appeal (3 C. J. 662; *Townsend v. Masterson, etc., Stone Dressing Co.*, 15 N. Y. 587), and jurisdiction of the person may be given by consent; but jurisdiction of the subject-matter may not. (*Sullivan v. Hudson Navigation Co.*, 182 App. Div. 152, 157; *Matter of Doey v. Howland Co.*, 224 N. Y. 30, 38; *Matter of Caffrey*, 52 App. Div. 264; *Cooley Const. Lim.* [5th

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Third Department, February, 1921.

ed.] 493.) The question of jurisdiction may be raised first on appeal. (*Matter of Caffrey, supra; Matter of Livingston*, 34 N. Y. 555, 570.)

But Newham was not in a maritime employment, nor was he under a maritime contract. The true test is the subject-matter of the contract—the nature and character of the work to be done. (*Matter of Doey v. Howland Co., supra*, 35.) Newham's employer was not the employer of the stevedore. The captain of the ship alone had charge of the stevedoring and the right to hire. The Chile Exploration Company could not employ stevedores for this ship. Newham was not employed to do stevedore work, nor checking and tallying. His employer was not engaged in a maritime business. He was employed to do that which a cargo owner, a shipper, could do himself had he the necessary knowledge and experience and that in which such shipper (not the shipowner or captain) would have the chief interest, namely, to observe whether the cargo was safely and properly stowed in order to protect the property and use all available cargo space. He was to do none of the work and to give no orders; he was simply to report to the shipper what he observed in these respects. He was not then to do any maritime work, but to report only how the maritime work was being done, and this report was to be made to his employer, who was not doing maritime work or business. When injured Newham was indeed accommodating an employee of the stevedore, a stranger in his relations to Newham's employer; carrying a message for him; and, while so occupied, he volunteered to aid another employee of the stevedore, who was having difficulty with a load on his truck on the dock. Mr. Talbot, who employed Newham for the Chile Exploration Company, testifies to the purposes for which he employed him, and he testifies that such work is not stevedoring. The fact that Newham was an expert stevedore is not sufficient on which to find that he was at the time doing stevedoring work, or maritime work. When, upon receiving the decision in *Knickerbocker Ice Co. v. Stewart (supra)*, the Chile Exploration Company made its motion to have vacated the former decision, the Industrial Commission, in denying the motion, held that Newham was not working under a maritime contract and his case was not within maritime

jurisdiction. We find no sufficient reason for believing this decision was erroneous.

No other question as to jurisdiction has been raised or argued.

The award should be affirmed.

All concur, KILEY J., with a memorandum, except JOHN M. KELLOGG, P. J., who dissents on the authority of *Matter of Doey v. Howland Co.* (224 N. Y. 30).

KILEY, J. (concurring):

There are two very able briefs in this case; the brief of claimant's counsel I regard as the best I have seen on that side of the question in any of these cases. I have been unable to find that one of the questions here presented has been passed upon heretofore in the courts. It is established that a party may waive his constitutional rights; also that parties cannot confer jurisdiction, not otherwise had, upon a court by stipulation. It is also established that the question of the lack of jurisdiction can be raised at any time during the course of the proceeding or action; but it has not been determined whether or not a party can, by stipulation, foreclose his right to raise that question? If he can, this appellant has, by stipulation, foreclosed its right to raise that question upon this appeal. In the view of the case taken by Mr. Justice VAN KIRK in his admirable opinion the question does not have to be decided on the determination of this appeal. He finds that the claimant was not engaged in maritime work. That question is decidedly close. This man was employed, not in the actual physical labor of stevedoring, or to openly superintend or oversee the work of stevedoring, but such work as he was employed to do arose out of and was incidental to maritime work. If the men doing the work of stevedoring placed a small package or article toward the bottom of the pile or tier of the goods or commodity being packed in the hold of the ship, it was claimant's duty and his work to report that to his superior, who could have the error corrected, so that while claimant did not do the actual physical work of changing the location of the article, he was the one who caused it to be done. In *Sullivan v. Hudson Navigation Co.* (182 App. Div. 152) Mr. Justice WOODWARD

wrote: "It is not the particular kind of work which the person is qualified to perform, or the fact that he is performing a particular kind of work, which determines the exclusive jurisdiction of a court of admiralty; it is the character of the contract — whether it has reference to maritime service or maritime transactions." Claimant's contract had reference to both maritime service and maritime transactions. If we should find that it had, then it would be necessary to pass upon the other question above suggested, viz., the force of the stipulation.

I concur in result.

Award affirmed.

SCANDINAVIAN IMPORT-EXPORT COMPANY, INC., Respondent,
v. FRANK H. BACHMAN and Others, Copartners Doing
Business under the Firm Name and Style of H. F. BACH-
MAN & Co., Appellants.

First Department, March 4, 1921.

Corporations — when corporation may not repudiate agreement to deal in cotton futures and recover back moneys deposited as margins on ground of ultra vires — when purchases of cotton future contracts not unlawful — application of rule of Cotton Exchange that brokers deal as principals — defense of ultra vires not looked upon with favor with respect to business and trading corporations.

A corporation authorized by its charter to buy and sell any kind of personal property and any interest therein may contract with a firm of brokers for speculation in cotton futures and is not entitled to repudiate said contract and the transactions thereunder and to recover back money deposited as margins solely on the ground that the contract was *ultra vires*.

The complaint does not show that the plaintiff's agreement with the defendants was unlawful or that the transactions had thereunder were unlawful.

Purchases of cotton future contracts do not become unlawful by being closed out by a sale by the broker, by direction of the customer, before the time for the delivery of the cotton under the contracts and by a settlement being then made between them on the basis of the difference between the purchase and selling price.

The rules of the Cotton Exchange under which the brokers deal as principals do not preclude the making of a contract between a customer and a broker by which, as between them, the broker would become the agent of the customer who would be entitled, as between him and the broker, to the benefit of the transactions had by the broker as principal with other brokers, but for the customer.

The defense of *ultra vires* with respect to business and trading corporations is not looked upon with favor, especially concerning contracts which have been fully executed by the other party.

Allegations of the complaint aforesaid that the defendants under the contract executed orders given by the plaintiff from time to time for the purchase and sale of cotton future contracts preclude a recovery by the plaintiff, in disregard of the transactions had by the defendants for its account, of the money it deposited with the defendants.

APPEAL by the defendants, Frank H. Bachman and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of November, 1920, denying their motion for an order sustaining their demurrer to the complaint and for judgment on the pleadings.

The complaint shows that the plaintiff is a domestic corporation, duly organized and existing under the Business Corporations Law; that its certificate of incorporation — designated in the complaint as its charter — was filed in the office of the Secretary of State on the 8th of August, 1919, and a duplicate thereof was filed in the office of the county clerk of New York county three days thereafter; that its principal office and place of business is at No. 52 Broadway, borough of Manhattan, New York city; that the defendants were and are copartners in business in the city, county and State of New York under the firm name of H. F. Bachman & Co.; that on or about the 17th of March, 1920, plaintiff and defendants entered into an agreement wherein and whereby it was agreed that the plaintiff would open an account with the defendants "for the purpose of enabling plaintiff to speculate in cotton futures and that defendants would execute plaintiff's orders to buy and sell cotton futures for the account of plaintiff;" that thereafter, pursuant to said agreement, plaintiff requested defendants from time to time to sell and buy cotton future contracts and the defendants executed the orders; that pursuant to the agreement and upon the request of the defendants,

plaintiff paid to the defendants specified sums of money on different dates commencing with the 5th day of April, 1920, and terminating on the third of August thereafter, aggregating \$13,153.03; that the sole powers granted to the plaintiff by the State of New York are set forth in its certificate of incorporation or charter as follows:

" To do a general business as commission merchants, selling agent and factor under *del credere* commission or otherwise in the manner and to the same extent as natural persons could do.

" To carry on any or all business as manufacturers, producers, merchants, wholesale and retail, importers and exporters, generally without limitation as to class of products and merchandise, and to manufacture, produce, adapt, prepare, buy, sell and otherwise deal in any materials, articles or things required in connection with or incidental to the manufacture, production and dealing in such products.

" To make and enter into all manner and kinds of contracts, agreements and obligations by or with any person or persons, corporation or corporations for the purchasing, acquiring, holding, manufacturing and selling or otherwise dealing in, either as principal or agent, upon commission or otherwise, any and all kinds of goods, articles or personal property, whatsoever, and generally with full power to perform any and all acts connected therewith or arising therefrom, or incidental thereto, and any and all acts proper or necessary for the purpose of the business.

" To carry on and undertake any business, undertaking, transaction or operation commonly carried on or undertaken by merchants, commission men, factors, brokers, importers and exporters and manufacturers' agents.

" SUBJECT TO THE LIMITATIONS AND RESTRICTIONS IMPOSED BY
LAW:

" To purchase, lease or otherwise acquire and to hold, own, sell or dispose of real and personal property of all kinds, and in particular lands, buildings, business concerns and undertakings, shares of stock, mortgages, bonds, debentures and other securities, merchandise, book debts and claims, trademarks, trade names, patents and patent rights, copyrights and any interest in real or personal property;

"To borrow money for its corporate purposes and to make, accept, endorse, execute and issue promissory notes, bills of exchange, bonds, debentures or other obligations from time to time, for the purchase of property or for any purpose in or about the business of the company, and, if deemed proper, to secure the payment of any such obligations by mortgage, pledge, deed of trust or otherwise;

"To acquire, and take over as a going concern, and thereafter to carry on the business of any person, firm or corporation engaged in any business which this corporation is authorized to carry on, and in connection therewith, to acquire the good will and all or any of the assets and to assume or otherwise provide for all or any of the liabilities of any such business;

"To sell, improve, manage, develop, lease, mortgage, dispose of or otherwise turn to account or deal with all or any part of the property of the company;

"To carry on business at any place or places within the jurisdiction of the United States, and in any and all foreign countries, and to purchase, hold, mortgage, convey, lease or otherwise dispose of and deal with real and personal property, at any such place or places;

"To do all and everything necessary, suitable or proper for the accomplishment of any of the purposes, the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or in connection with other corporations, firms or individuals and either as principals or agents, and to do every other act or acts, thing or things, incidental or appurtenant to or growing out of or connected with the aforesaid objects, purposes or powers, or any of them."

It is further alleged that the agreement and the transactions had thereunder were *ultra vires* and were not authorized by, were contrary to, in direct violation of, and extraneous to the charter of the plaintiff and that this was well known to the defendants and that the plaintiff never received anything of value from the defendants under said agreement and did not derive any benefit or advantage "from the aforesaid transactions with defendants." Judgment is demanded for the sum of \$13,153.06, together with interest and costs. The sole ground of the demurrer is that it appears upon the face of the

complaint that it does not state facts sufficient to constitute a cause of action and defendants demand judgment dismissing the complaint, with costs.

Edward A. Alexander of counsel [*Frank Weinstein* with him on the brief], for the appellants.

Ten Eyck R. Beardsley, for the respondent.

LAUGHLIN, J.:

The complaint was framed and the appeal has been argued on the theory that the certificate of incorporation is no broader than authorized and, therefore, since those powers apparently authorize any lawful business, with certain exceptions not applicable here (Business Corp. Law, § 2; * *Jacobs v. Monaton R. I. Corp.*, 212 N. Y. 48), we shall so assume.

It will be observed from the statement of facts that the certificate of incorporation of the plaintiff does not indicate a primary purpose or purposes of its organization and specifies many powers and also confers upon it very general and comprehensive powers under which it may embark in a variety of enterprises without even limitation as to territory. It was authorized, among other things, to do a general business as a commission merchant, selling agent, and factor, under *del credere* commissions or otherwise in the manner and to the same extent as a natural person; to carry on business as a manufacturer, producer, merchant, and wholesale and retail importer and exporter of any products and merchandise; to make and enter into "all manner and kinds of contracts, agreements and obligations" for purchasing, acquiring, holding, manufacturing, selling or otherwise dealing in all kinds of goods, articles, or personal property, either as principal or as agent, and subject to the limitations and restrictions imposed by law to purchase, lease or otherwise acquire, hold, sell, convey, and dispose of real and personal property, including shares of stock and other securities and any interest in real or personal property, and to borrow money for its corporate purposes and to accept, indorse, execute and issue promissory notes and other obligations for the purchase of property or for any other purpose in or about the business of the company,

* Amd. by Laws of 1909, chap. 484.—[REp.]

and to secure payment of such obligations by mortgage, pledge, deed of trust, or otherwise, and to carry on business at any place or places within the jurisdiction of the United States and in foreign countries, and to purchase, hold, mortgage, lease or otherwise dispose of and deal in real estate and personal property at any such place or places; to do all things necessary, suitable or proper for the accomplishment of any of the purposes, the attainment of any of the objects, or the furtherance of any of the powers set forth in the certificate of incorporation, either alone or in connection with others and either as principal or agent, and to do every other act or thing incidental or appertaining to and growing out of or connected with "the aforesaid objects, purposes or powers, or any of them."

So far as appears, this was the only business in which the plaintiff engaged and after inducing the brokers to loan and advance the funds required over and above the margins deposited, it has repudiated all the transactions and claims the right to recover back the money deposited as margins.

It is to be borne in mind that it is the corporation itself which is attempting to repudiate its own contract duly authorized if the board of directors and stockholders could authorize it, and the purchases and sales of cotton future contracts which the defendants made for its account. The stockholders of the plaintiff are not directly before the court and it is unnecessary to express any opinion with respect to whether, after becoming stockholders of a corporation with such general powers, they might in any circumstances be entitled to enjoin the corporation from investing its funds in speculative prices. The points presented for decision relate only to the power of the corporation and its right to repudiate its own contract and transactions had under it and to recover back the moneys it deposited with the defendants solely on the ground that the contract and transactions which it assumed to authorize were *ultra vires*. I am of opinion that the authority conferred to buy and sell any kind of personal property and any interest therein authorized the corporation to deal in cotton and to buy and to sell it and to buy contracts for the future delivery of the cotton and to sell the same, which is the business it contracted to do and transacted with the defendants under the contract. The company was not authorized to make *unlawful*

contracts (*Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. Rep. 686); but the facts alleged do not show that its agreement with the defendants was unlawful or that the transactions had thereunder were unlawful. If it had been alleged that the plaintiff did not intend to take the cotton under the contracts and that it was so understood between the plaintiff and the defendants and that it was not to accept delivery of any of the cotton and that there were to be no actual purchases or sales but that settlements were to be made between the plaintiff and the defendants solely on differences by which is meant that if the difference between the market price of a contract purchased for the plaintiff and the price at which it was sold was in favor of the customer such difference was to be paid to the customer by the brokers, and if against the customer it was to be paid by it to the brokers, the agreement would constitute a gambling contract and be unlawful; but where that is not the intention of the customer and the understanding between him and the broker, purchases of cotton future contracts do not become unlawful by being closed out by a sale by the broker by direction of the customer before the time for the delivery of the cotton under the contracts and by a settlement being then made between them on the basis of the differences between the purchase and selling prices. (*Hurd v. Taylor*, 181 N. Y. 231; *Springs v. James*, 137 App. Div. 110; *affd.*, 202 N. Y. 603; *Smith v. Craig*, 211 *id.* 456; *Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. Rep. 686; 14 Am. & Eng. Ency. of Law [2d ed.], 605-607; 26 *id.* 1060; 20 Cyc. 926-931; *Dos Passos Stock & Stock B.* 405, 505, 506, 568, 572, 575-577, 582.) The allegations of the complaint fall far short of showing that the agreement was illegal within the rule stated.

Counsel for the respondent claims that under the rules of the Cotton Exchange, the brokers deal as principals; and that, therefore, defendants were not the agents of the plaintiff and that it must be deemed to have dealt with them as principals, and that since it is alleged that the plaintiff never received anything from the defendants, it is entitled to recover the money deposited with them. The rules of the Cotton Exchange are not pleaded, but very likely they so provide, for it appears from reported decisions that thereunder the brokers as between

themselves become principals (*Jemison v. C. S. Bank*, 122 N. Y. 135); but such a rule would not preclude the making of a contract between a customer and a broker by which as between them the broker would become the agent of the customer who would be entitled as between him and the broker to the benefit of the transactions had by the broker as principal with other brokers but for the customer.

It is, of course, well settled that a trustee may not speculate with trust funds (*Jemison v. C. S. Bank*, *supra*; *Hart v. Goadby*, 138 App. Div. 160), and that principle of law was applied in *Jemison v. C. S. Bank* (*supra*), wherein it was held that a savings bank, which was authorized to buy and sell government stocks and other securities, was not authorized to speculate in cotton futures; but the decision was predicated on the law regulating the securities in which such banks may invest the funds deposited with them and on the insecurity to the depositors that would result if such banks were allowed to speculate with the funds deposited with them. The courts in deciding whether acts are *ultra vires* and the effect thereof, recognize and apply a distinction between corporations, the purposes of which are, or largely are, of a fiduciary nature and business and trading corporations; and with respect to business and trading corporations the defense of *ultra vires* is not looked upon with favor, and especially, as here, concerning contracts which have been fully executed by the other party. (*Gause v. Commonwealth Trust Co.*, 196 N. Y. 134, 153-155; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Woodruff v. Erie R. Co.*, 93 id. 609; *Keating v. American Brewing Co.*, 62 App. Div. 501; *Vought v. Eastern Building & Loan Assn.*, 172 N. Y. 508; *Wormser v. Metropolitan Street R. Co.*, 184 id. 83-90; *Bath Gas Light Co. v. Claffy*, 151 id. 24; *White Corp.* [8th ed.] 35.)

The complaint does not show the state of the account between the plaintiff and the defendants, but it alleges that the defendants under the contract executed orders given by the plaintiff from time to time for the purchase and sale of cotton future contracts. These allegations preclude a recovery by the plaintiff, in disregard of the transactions had by the defendants for its account, of the money it deposited with the defendants.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the demurrer sustained and the complaint dismissed, with ten dollars costs.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, motion granted, demurrer sustained and complaint dismissed, with ten dollars costs.

FREDERICK J. KRAEMER, Appellant, v. WORLD WIDE TRADING COMPANY, INC., Respondent.

First Department, March 4, 1921.

Pleadings — determination of sufficiency of complaint in equity on demurrer and after issue joined, by answer and cause brought to trial as suit in equity — joint adventures — agreement to divide commissions received from third party — receipt of commissions in trust as agent of other party to agreement — accounting.

On demurrer the sufficiency of a complaint framed in equity depends upon whether or not it shows an equitable cause of action, but if issue has been joined by answer and the cause brought to trial as a suit in equity the complaint cannot be dismissed on the ground that plaintiff is not entitled to equitable relief provided it shows a cause of action at law.

A complaint in an action for an accounting showing that the plaintiff has a cause of action against the defendant for a balance on account of one-half the commissions received by it from a foreign corporation for negotiating the purchase by it of steamships, examined and held, that since the plaintiff took the risk of receiving nothing for his services and each of the parties was to receive one-half of any commissions paid therefor, a joint adventure is shown in which each party was to and did render services in earning the commissions, which, by the agreement, were to be paid by the foreign corporation to the defendant for himself and the plaintiff, and that a fiduciary relation existed between them under which the defendant received the commissions in trust as the agent of the plaintiff to the extent of one-half, which it was its duty to pay over to the plaintiff as received, and, therefore, the plaintiff is entitled to an accounting.

DOWLING, J., dissents, with opinion.

APPEAL by the plaintiff, Frederick J. Kraemer, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of

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New York on the 5th day of October, 1920, denying his motion for judgment on the pleadings and granting defendant's counter motion for judgment sustaining its demurrer to the complaint for insufficiency and dismissing the complaint.

Lawrence E. Brown of counsel [*Bullowa & Bullowa*, attorneys], for the appellant.

Frank B. York of counsel [*York & York*, attorneys], for the respondent.

LAUGHLIN, J.:

The complaint shows that the plaintiff has a cause of action against the defendant for a balance on account of one-half the commissions received by it from the *Empresa Naviera de Cuba*, a foreign corporation, for negotiating the purchase by it of four steamships. It is, however, framed in equity and, therefore, on demurrer the sufficiency thereof depends upon whether or not it shows an equitable cause of action (*Gosselin Corporation v. Mario Tapparelli fu Pietro, Inc.*, 191 App. Div. 580; *Spring v. Fidelity Mutual Life Ins. Co.*, 183 id. 134; *Consolidated Rubber Tire Co. v. Firestone Tire & R. Co.*, 135 id. 805; *Low v. Swartwout*, 171 id. 725; *Logan v. Fidelity-Phoenix Fire Ins. Co.*, 187 id. 153); but if issue had been joined by answer and the cause brought to trial as a suit in equity the complaint could not be dismissed on the ground that the plaintiff is not entitled to equitable relief provided it shows a cause of action at law, and in that event it would be transferred to the jury calendar. (*Thomas v. Schumacher*, 17 App. Div. 441; *Glyn v. Tille Guarantee & Trust Company*, 132 id. 859; *Everett v. De Fontaine*, 78 id. 219; *Perrin v. Smith*, 135 id. 127.) The plaintiff alleges that on or about the 20th of November, 1919, he and the defendant entered into a contract by which the latter agreed to pay to him "one-half of a commission of \$10,000, when and as received by it" from said *Empresa Naviera de Cuba*, on the purchase by it of the steamship *St. Paul* and that the plaintiff and defendant thereafter co-operated in securing the sale of said steamship to the foreign corporation, which paid the defendant the sum of \$10,000 "as a commission for the services of the plaintiff and the defendant" in

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connection with the sale of the steamship; that in the month of December, 1919, it was agreed between the parties "that in consideration of the assistance to be rendered by the plaintiff to the defendant in procuring steamships" for said foreign corporation "defendant would pay to the plaintiff one-half of any commission which might be paid to it" by said foreign corporation for negotiating the purchase of steamships by it in the United States and the defendant agreed to pay "such one-half of said commission" to the plaintiff immediately upon the receipt of the same by it, and that thereafter plaintiff and the defendant procured the purchase by said foreign corporation of three other steamships pursuant to an agreement by the foreign corporation "that it would pay to the defendant for the services of the plaintiff and the defendant rendered in or about the purchase of said steamers, five per cent of the purchase price thereof;" that thereafter and prior to the commencement of the action, the foreign corporation paid to the defendant the commission due for the services of the plaintiff and defendant in and about the purchase of said steamships "and the defendant received such amounts for the account of the plaintiff and the defendant under said agreement with the plaintiff that it would pay one-half thereof to this plaintiff;" that the defendant has refused and still refuses to account to the plaintiff for any of the moneys so received by it from said foreign corporation for its services and the services of the plaintiff or to pay over to the plaintiff any part thereof excepting the sum of \$8,668.86, and that the defendant holds a large sum of money which it has received from said foreign corporation for the services of the plaintiff and of the defendant, "one-half of which is the property of this plaintiff," and has refused to account for or to pay the same over to the plaintiff. Judgment is demanded for an accounting between the plaintiff and the defendant concerning all moneys received by the defendant from said foreign corporation for the services of the plaintiff and the defendant in connection with the purchase by the foreign corporation of the four steamships and that it be decreed that the defendant pay over to the plaintiff such amount as shall be ascertained to be due to him from the defendant and for other and further relief, with costs.

The point presented by the appeal is whether these allegations show a joint adventure entitling plaintiff to an accounting or whether they should be construed as showing merely an employment of the plaintiff by the defendant with an obligation to pay therefor an amount *equal* to one-half the commissions for which he has only an action at law. The law by which the case is to be decided is well settled. The only difficulty is in determining from the facts to which class of cases a particular case belongs. I regard this as a border case, but since plaintiff took the risk of receiving nothing for his services and each of the parties was to receive one-half of any commissions paid therefor, I am of opinion that a joint adventure is shown in which each of the parties was to and did render services in earning the commissions, which, by the agreement, were to be paid by the foreign corporation to the defendant for himself and the plaintiff, and that a fiduciary relation existed between them under which the defendant received the commissions in trust as the agent of the plaintiff to the extent of one-half, which it was its duty to pay over to the plaintiff as received. If the allegations of the complaint are susceptible of this construction, as I think they are, the right to an accounting is clear. (*May v. Hettrick Brothers Co.*, 181 App. Div. 3; *affd.*, 226 N. Y. 580; *Valdes v. Larrinaga*, 233 U. S. 705; *Marvin v. Brooks*, 94 N. Y. 71; *Marston v. Gould*, 69 id. 220; *Franken-Karch Corp. v. Castriotis*, 195 App. Div. 529; *China & Japan Trading Co., Ltd., v. Provand*, 155 id. 171; *Hill v. Curtis*, 154 id. 662; *Freeman v. Miller*, 157 id. 715, 719; *Boice v. Jones*, 106 id. 547; *Peirce v. McDonald*, 168 id. 47, 56; *Frethey v. Durant*, 24 id. 58; *Jordan v. Underhill*, 91 id. 124; *Weldon v. Brown*, 84 id. 482; 89 id. 586; *Hathaway v. Clendering Co.*, 135 id. 407; *Rice v. Peters*, 128 id. 776; *Stoller v. Franken*, 171 id. 327.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and defendant's motion denied and plaintiff's motion granted, with ten dollars costs, but with leave to defendant to withdraw the demurrer and answer on payment of the costs of the appeal and motion.

CLARKE, P. J., MERRELL and GREENBAUM, JJ., concur; DOWLING, J., dissents.

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DOWLING, J. (dissenting):

The plaintiff alleges in his complaint as follows:

"2. That heretofore and on or about the 20th day of November, 1919, the defendant entered into an agreement with the plaintiff under the terms of which the defendant agreed to pay to the plaintiff one-half of a commission of \$10,000, when and as received by it from Empresa Naviera de Cuba, a foreign corporation, on the purchase by said Empresa Naviera de Cuba of the steamship 'St. Paul' and thereafter and in the month of December, 1919, it was further agreed by and between the plaintiff and the defendant that in consideration of the assistance to be rendered by the plaintiff to the defendant in procuring steamships for said Empresa Naviera de Cuba, the defendant would pay to the plaintiff one-half of any commission which might be paid to it by Empresa Naviera de Cuba for purchasing steamships in the United States of America, such one-half of said commission to be paid to the plaintiff immediately upon receipt of the same."

He then alleges that plaintiff and defendant co-operated in securing the sale of the steamship *St. Paul* to Empresa Naviera de Cuba, which paid defendant the sum of \$10,000 as a commission for the services of plaintiff and defendant. He further alleges that in November and December, 1919, and January, 1920, plaintiff and defendant procured the purchase by the same company of the steamships *Minneapolis*, *Yadkin* and *Watauga*, under an agreement by said company that it would pay defendant for its services and those of plaintiff five per cent of the purchase price thereof; that said company has paid to defendant the commissions due under said agreement for the purchase of said three steamers, "and the defendant received such amounts for the account of the plaintiff and the defendant under said agreement with the plaintiff that it would pay one-half thereof to this plaintiff," and plaintiff demands judgment: *First*. That an accounting be had between the plaintiff and the defendant of all amounts received by the defendant from the Empresa Naviera de Cuba for the services of the plaintiff and the defendant in connection with the purchase of the steamships *St. Paul*, *Minneapolis*, *Yadkin* and *Watauga*. *Second*. That upon com-

pletion of said accounting the defendant be decreed to pay over to this plaintiff such sums as shall be ascertained to be due to him from said defendant.

The complaint is framed solely in equity and I can find no equitable cause of action stated therein.

I am of the opinion that it set forth no joint ownership of a fund with a right to an accounting, nor a partnership in said fund, but an agreement on the part of plaintiff to render services for defendant in connection with the purchase of steamships, for which defendant bound itself to pay plaintiff one-half of any commissions it received in the premises. I think that only an action at law is set forth, entitling plaintiff to recover one-half of the amount received by defendant under the agreement between them.

The order appealed from should, therefore, be affirmed, with ten dollars costs and disbursements.

Order reversed, with ten dollars costs and disbursements, defendant's motion denied and plaintiff's motion granted, with ten dollars costs, with leave to defendant to withdraw demurrer and to answer on payment of said costs.

JOSEPH M. SWENSON, Appellant, v. ELMER E. TROWBRIDGE
and HAROLD BOLSTER, Respondents.

First Department, March 4, 1921.

New trial — power of court to entertain or grant motion for, where jury is waived and formal decision is rendered — Code of Civil Procedure, section 999, construed and applied.

A court has no authority to entertain or grant a motion for a new trial under section 999 of the Code of Civil Procedure, where a jury has been waived, the cause tried by the court and a formal decision made upon which judgment was entered.

APPEAL by the plaintiff, Joseph M. Swenson, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 10th day of November, 1920, granting defendants' motion to set aside the verdict and for a new trial made upon the minutes.

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Neil P. Cullom of counsel [*Cullom & Rinke*, attorneys], for the appellant.

John Hall Jones, for the respondent *Trowbridge*.

LAUGHLIN, J.:

The action is to recover on two promissory notes made by the defendants and payable in Nebraska. Defendants answered jointly, pleading as partial defenses that the notes were made and delivered pursuant to a corrupt and usurious agreement and that, therefore, the plaintiff was not entitled under the law of Nebraska to recover the amount claimed.

The record shows that when the cause was reached for trial a jury was waived and that the issues were thereupon tried by the court without a jury. Counsel for the plaintiff opened, stating the issues as presented by the pleadings; and counsel for the defendants in opening claimed a statement of facts somewhat different from those pleaded, in that he claimed that the defendants were partners and that one of them had paid one-half of the amount due on the notes and the other had paid a proportionate amount of the balance and had secured the discontinuance of this action as to him, and that under the law of Nebraska this released both makers, and also that the plaintiff was not the real party in interest, but brought the action for the purpose of giving one of the defendants a right of action over against the other, his copartner, to get back the money on a judgment in favor of the plaintiff, to whom he had paid it. Counsel for the plaintiff denied that the facts were as so claimed. Counsel for the plaintiff then took the stand and offered in evidence a computation of the balance due according to the law of Nebraska. On his cross-examination it was shown that \$4,000 had been paid on one of the notes by the defendant *Bolster* and that a consent to a discontinuance of this action as against him had been signed by the plaintiff and was held by the witness. Defendant then undertook, but without success, to show that the notes were usurious in that they were given for a loan and that another note for \$3,300 was given by the makers to the plaintiff, which it was claimed rested on the same consideration; but it was shown that it was given for a separate and independent consideration. A

Nebraska decision (*Scofield v. Clark*, 48 Neb. 711) to the effect that a release of one joint obligor releases both was then offered in evidence. Defendants were precluded from showing that within a year plaintiff had stated in a conversation with a third party that he had assigned his interest in this action. This is the substance of the only evidence offered by either party, and at its close the record shows that counsel for the plaintiff moved for a judgment for the balance due on the notes and the motion was granted, and the defendants excepted and moved for a new trial on the minutes on all the grounds specified in section 999 of the Code of Civil Procedure. The court, without objection on the part of the plaintiff, entertained the motion and afforded defendants an opportunity to obtain the stenographer's minutes but announced that no stay would be granted. The record further shows that the issues were tried on the 15th of October, 1920; that a formal decision containing findings of fact and conclusions of law and authorizing the entry of judgment in favor of the plaintiff for the balance due on the notes was signed on the twenty-second of October and that judgment was entered thereon the following day, and the order granting the motion for a new trial was made on the tenth of November thereafter. The order granting a new trial seems to have been made under a misapprehension, for it purports to set aside a verdict and to grant the new trial on all the grounds specified in section 999 of the Code of Civil Procedure upon condition that the defendant Trowbridge pay the taxable costs and disbursements in the action and stipulate that the judgment entered should stand as security, and in default thereof the motion was to be deemed denied. The memorandum opinion of the learned trial court indicates that the court was of the opinion that the defendant Trowbridge had defenses which were not properly pleaded and that he should be afforded an opportunity to procure the amendment of his pleading and the benefit of testimony in support thereof.

The only points made in behalf of the appellant are that the granting of the order was an improper exercise of the power of the court under section 999 of the Code of Civil Procedure in that the order was made on the theory of surprise, which is not a ground for such a motion, and that the consent

to the discontinuance of the action as against the defendant Bolster did not constitute a release of the causes of action as against him or discharge the defendants. I deem it unnecessary to discuss these points for it is evident that the court, through the attitude of the attorneys for both parties and owing to the fact that the trial was had and the motion was made in a jury part, entertained and granted the motion on the erroneous theory that the cause was to be tried by the court as if a jury had been present and that a verdict had been directed, which was not the case. A jury having been waived and the cause having been tried by the court and a formal decision having been made upon which judgment was entered, the provisions of section 999 were inapplicable and the court was without authority to entertain or grant a motion for a new trial thereunder. (*Rosenquest v. Canary*, 27 App. Div. 30; *Knight v. Sackett & Wilhelms Lith. Co.*, 31 Abb. N. C. 373; *affd.*, without discussion of this point, 141 N. Y. 404.)

It follows that the order should be reversed, but since the reversal is on a ground not presented to the trial court or taken here by the appellant, without costs, and motion denied, without costs.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., *concur*.

Order reversed, without costs, and motion denied, without costs.

BELLAS HESS & Co., INC., Appellant, v. ALEXANDER & Co., INC., Respondent.

First Department, March 4, 1921.

Sales — action for breach of contract for sale and manufacture of goods — evidence establishing prima facie case of meeting of minds of parties on complete contract — condition in written contract that goods to be manufactured if material obtainable from mill — oral waiver of condition by seller having knowledge of actual fulfillment of condition — waiver as question for jury.

In an action for the breach of an alleged written agreement for the manufacture and sale of goods, evidence held, to establish a *prima facie* case of the meeting of the minds of the parties on a complete contract.

A condition in a written contract for the sale of goods to be manufactured from material which is to be obtained by the seller, to the effect that the goods will be delivered in accordance with the terms of the contract if the material entering into the manufactured product can be procured from the mill, may be waived by parol where the seller knows the condition has been in fact fulfilled.

In such case the question whether such condition has been waived or abandoned by the seller, by statements and representations as to ability to perform the contract, is for the determination of the jury.

APPEAL by the plaintiff, Bellas Hess & Co., Inc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 19th day of January, 1920, dismissing the complaint at the close of the plaintiff's case.

Herman B. Goodstein, attorney [*Thomas J. Kavanagh* with him on the brief], for the appellant.

Mark E. Goldberg, attorney [*Samuel S. Goldberg* of counsel], for the respondent.

DOWLING, J.:

This action is brought to recover the sum of \$2,250 as damages for the breach of a written agreement made on May 27, 1919, whereby defendant agreed to manufacture and deliver to plaintiff on or before July 15, 1919, seventy-five dozen of men's silk shirts at the price of forty-eight dollars per dozen. The answer, after denying most of the allegations of the complaint, set up the Statute of Frauds,* in that the agreement was for a sale of goods for the price of more than fifty dollars, and that the agreement was not in writing nor was any delivery of any part of the goods made nor any payment made on account thereof.

The proof established that the order for the goods in question was solicited by defendant's salesman. Plaintiff sent a written order to defendant, dated May 23, 1919, for seventy-five dozen satin striped habutai silk shirts "as selected," the quantities in each size from fourteen to seventeen being speci-

* See Pers. Prop. Law, § 85, as added by Laws of 1911, chap. 571.—
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fied, the price being forty-eight dollars per dozen. The order contained these provisions, among others: "Our Hangers in Neck — Box fronts." Replying thereto, defendant wrote under date of May twenty-seventh:

"We are in receipt of your order #64909 for 75 dozen silk shirts at \$48.00 per dozen, for which please accept our thanks.

"We regret to advise that we cannot give you same with a box front, as these shirts are in process of making with the plain centers.

"Furthermore, we are accepting this order with the condition that we get deliveries from our silk mill, and assure you that we will do all in our power to deliver this order as near complete as possible."

A day or two after the date of this letter, Arthur J. Ridley, plaintiff's manager, called at defendant's office and there saw defendant's vice-president, Alexander, in reference to the letter and the two statements therein contained. Alexander said the shirts were in process of making. Ridley said: "Further down in the letter you state that the delivery is subject to no delivery of piece goods," and asked: "What do you mean by those two statements? * * * What I want to know is, are we going to get these shirts or not?" Alexander replied, "You will get those shirts." Alexander further said: "Some of these shirts will be made with plain centers," and Ridley replied: "That doesn't make a bit of difference to us. We will take them either way," and Alexander remarked: "Well, I thought so."

A letter was offered in evidence by defendant, signed by plaintiff, dated May twenty-ninth, in which it was said: "We do not quite understand your letter of May 27th. In one paragraph you state the shirts are in process of making, and in the next paragraph you say we are accepting this order with the conditions that we get deliveries from the silk mill. Your salesman stated to us positively that you had enough goods on hand for 100 doz. Perhaps it would be best to have him call on us Monday." This letter Ridley admitted writing, but was uncertain when it was mailed. He admitted that he had written the letter before he had called on Alexander and that no salesman had visited him. But there is no

denial of his positive testimony as to his conversation with Alexander.

At the close of plaintiff's case the trial court granted a motion to dismiss the complaint on the ground that "no enforceable contract is shown and that there was not that meeting of the minds of the parties required by law to constitute a complete contract."

The defendant contends that the minds of the parties never met on a complete contract. It is quite true that plaintiff failed to prove the allegation of its complaint that an agreement in writing was entered into by plaintiff and defendant on May 27, 1919. The agreement between the parties, if any, consisted of plaintiff's original order of May twenty-third and of defendant's letter of May twenty-seventh, with the oral acceptance thereof by plaintiff, with these modifications mutually agreed upon: (1) Defendant withdrew its condition that it would accept the order only on condition that its silk mill made deliveries and agreed to deliver without qualification; (2) plaintiff agreed to accept plain centers instead of box fronts. Thus the agreement as claimed to be made consisted of plaintiff's written order, defendant's written qualified acceptance, and the oral agreement based thereon, which removed all qualifications and made the contract complete. A definite offer in writing signed by a vendor is sufficient to charge him, even though the acceptance be by parol. (*Kohn & Baer v. Ariowitsch Co., Inc.*, 181 App. Div. 415.) But no question was raised at the trial of any variance between the pleading and the proof; and no motion to dismiss was made because plaintiff had failed to prove the agreement alleged in its complaint.

Upon plaintiff's proof, the defendant's requirement that the shirts be made with plain centers only was accepted by it. As to the provision inserted by defendant that the order was accepted with the condition that it get deliveries from its silk mills, I think that a question was presented for the jury upon all the facts in the case as to whether the condition had not been waived or abandoned by defendant. These facts were: (1) The statement in the same letter and following this condition, that "we will do all in our power to deliver this order as near complete as possible;" (2) the statement by defendant

to plaintiff, "You will get those shirts;" (3) the statement in the letter of May twenty-seventh, "These shirts are in process of making with the plain centers," which negatives the claim that any goods were still to come from the mill, so as to bring the contract even within the original condition, if it had not been waived. This is not a case of a written proposal, in which such elements as quantity, quality, price, time of delivery or terms of payment are sought to be modified by an oral agreement, which could not be done, since there would be left no written memorandum of the actual contract as made orally. It is a case where the party making the written memorandum inserted a condition on which the very existence of any binding agreement whatever depended, and that condition, it seems to me, such party could orally waive, particularly as he alone would know if it really were applicable to the existing situation. Here the seller had knowledge as to whether it had received (or would surely receive) the required silk from its mill to fill plaintiff's order. And if it knew the condition was in fact fulfilled, I think it could orally waive it as part of its memorandum, leaving all the essential elements of the contract in writing.

Upon this record I am of the opinion, therefore, that a *prima facie* case had been made out of the meeting of the minds of the parties upon a complete contract. The letter of May twenty-ninth did not destroy the effect of Ridley's testimony in chief, whatever weight it might have with a jury in case his version of his conversation with Alexander should be denied by the latter.

The judgment appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, MERRELL and GREENBAUM, JJ.,
concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ADAM NAUSS, Respondent, v. NAUSS BROTHERS COMPANY and Others, Defendants, Impleaded with FLORENCE T. HILDEBRAND, as Executrix, etc., of WENDOLIN J. NAUSS, Deceased, Appellant, and CHARLES E. NAUSS, as Executor, etc., of WENDOLIN J. NAUSS, Deceased, Respondent. (Motion No. 1.)

First Department, March 4, 1921.

Corporations — action in equity by stockholder against corporation and executrix of stockholder to compel distribution of dividends and for other equitable relief — question presented on motion by executrix for judgment on pleadings — when equity will not direct declaration and distribution of dividends — collusive action against corporation not shown — equity will not interfere to maintain status quo pending examination of books — executrix not necessary or proper party.

In a suit in equity by a stockholder of a corporation against the corporation and the executrix of a stockholder for a decree requiring the corporation to declare and distribute dividends, enjoining its directors from further acting and for their removal, and for an accounting and the appointment of a receiver of the property *pendente lite*, in which the said executrix appeals from an order denying her motion for judgment on the pleadings, the question presented for decision is not merely whether a cause of action for any relief against her as executrix is stated but whether the complaint sufficiently shows a cause of action for any of the equitable relief demanded and whether she in her representative capacity is a necessary or proper party to the determination of the issues upon which plaintiff's right thereto depends.

Whether dividends shall be declared out of the surplus earnings of a corporation, or whether the surplus shall be used to increase the business or retained for the security and stability of the business, is a matter which rests in the sound discretion of the directors, and unless it appears that they recognize the propriety of appropriating the surplus earnings to the payment of dividends, and the majority acting in bad faith toward the stockholders have refrained from so doing, the court will not intervene for the purpose of requiring the declaration and distribution of dividends. The complaint herein does not show that the directors of the defendant corporation recognized the propriety of declaring dividends, nor does it show a duty on the part of the directors to do so, and a mere general charge of bad faith is not sufficient.

The allegations in the complaint as to the proceedings by the said executrix to recover against the corporation on certain promissory notes given by it to her testator, to the effect that said action thereon was collusively brought and the cause of action assigned to other stockholders for

the purpose of forcing the corporation out of existence, are not sufficient to entitle the plaintiff to any relief, for the allegations that the said action was collusively brought cannot avail inasmuch as the notes on which it was brought are not impeached, though the plaintiff might have done so if that were the fact, since at the time they were given he was treasurer of the corporation and signed the notes as such, and moreover, so far as the appellant is concerned, she had assigned all interest in said cause of action and no relief is demanded or needed against her with respect thereto.

A suit in equity cannot be maintained on the theory that it is necessary to maintain the *status quo* pending a mandamus proceeding instituted by the plaintiff for the inspection of the books of the company.

On all the allegations in the complaint the appellant was neither a necessary nor proper party to the action and the complaint should have been dismissed as to her on her motion for judgment on the pleadings.

APPEAL by the defendant, Florence T. Hildebrand, as executrix, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of August, 1920, denying said defendant's motion for judgment on the pleadings dismissing the complaint.

Joseph H. Kohan of counsel [*Jerome Steiner* with him on the brief; *Petersen, Steiner & Kohan*, attorneys], for the appellant.

John C. Judge, for the plaintiff, respondent.

Charles A. Winter, for the respondent *Charles E. Nauss*, as executor.

LAUGHLIN, J.:

This is a suit in equity by a stockholder of the defendant Nauss Brothers Company for a decree requiring the company to declare and distribute dividends from its surplus assets, enjoining its directors and officers from further acting and for their removal, for an accounting of all the acts and doings of the company from its incorporation and directing that the surplus shown on such accounting be distributed among the stockholders, and for the appointment of a receiver of the property of the company *pendente lite* with authority to carry on its business.

The complaint having been framed for equitable relief, the point presented for decision on appellant's motion was not

merely whether a cause of action for any relief against her as executrix is stated but whether the complaint sufficiently shows a cause of action for any of the equitable relief demanded and whether she in her representative capacity is a necessary or a proper party to the determination of the issues upon which plaintiff's right thereto depends. (*Travis v. Knox Terpezone Co.*, 165 App. Div. 156; *affd.*, 215 N. Y. 259; *Trotter v. Lisman*, 209 *id.* 174.) The complaint shows that the company was incorporated in 1894 under the laws of New York with a capital stock of 1,000 shares of the par value of \$100 each, for the purpose of buying, selling and trading in meats and domestic supplies incidental thereto; that its principal place of business was in the county of New York; that since 1894 plaintiff has been the owner of record of 88 shares of the capital stock; that Wendolin J. Nauss was the president and a director of the company down to the year 1907, when he made his son, Charles E. Nauss, president, but that, although not president, he remained in control of the corporation until his death in 1918; that the appellant became his executrix and his said son executor of his estate and they qualified and entered upon the discharge of their duties, as such and are still so acting; that the plaintiff was the treasurer of the company, which had been doing a large and profitable business, but paid no dividends for twenty-one years prior to the death of Nauss, excepting possibly in the year 1910, although dividends could have been paid continuously each year if the decedent had so desired; that after the death of Nauss his executors "collusively" began an action in the Supreme Court, New York county, against the company on various notes which they claimed were outstanding, valid, legal obligations against it and conducted the action to a point where a judgment might have been taken against the company for upwards of \$56,000, but that the judgment has not been entered; that "as part of said arrangement" (no arrangement, however, having been thereinbefore referred to) the prospective judgment was purchased by the defendants Henry J. Hildebrand and Frederick Nauss "for the sole purpose of taking control" of the company "and doing with it what they saw fit, and at all times threatening and menacing the said corporation with the fact that if this plaintiff or any

other stockholder of the said corporation demanded his rights that said judgment would be put into execution and the corporation wiped out;" that "in the collusive arrangements that were made to take a judgment" against the company, the attorneys for the plaintiffs in that action sent this plaintiff, who was then the treasurer of the company, to a firm of attorneys designated by them, who had never represented the company and were unknown to him, saying: "These are the attorneys who will take charge of this friendly suit and will only charge \$250 for it." The complaint does not show that the plaintiff employed said firm of attorneys to represent the company or to what extent the proceedings in that action progressed, excepting as may be inferred from the allegation that judgment may be entered therein against the company; and although the plaintiff was treasurer of the company and in a position to know the facts with respect to the notes, he neither alleges that they were or were not valid obligations of the company. He next alleges, evidently referring to the action on the notes, that the "proceedings were fictitious, collusive and not good in law" and that the existence "of the alleged obligations" against the company renders its financial status to be that of insolvency, while in truth and in fact it is a prosperous going concern and the plaintiff and the other stockholders should be receiving their profits by way of dividends and not be deprived of their rights "by the above and other acts illegal and unwarranted" by the true facts and circumstances; that if it can be proved "by the present holders thereof that the said alleged judgment is a good, valid and legal obligation" against the company, it should be paid or a settlement should be made and it should not be held as a menace "to continuously defeat the rights of this plaintiff and the other stockholders;" that if the company is unable to pay the judgment, then it is insolvent and has committed an act of bankruptcy and a receiver should be appointed, and if the judgment is not a good, valid and existing claim against the company, the officers and directors should have it set aside and declared null and void; that said Henry J. Hildebrand controls about 476 shares of the capital stock and he and the defendant Frederick Nauss, who

is the president of the company, manage and control the corporation and that the defendants who are sued in their individual capacities are the other directors, and are hired clerks or journeymen butchers, employed in the business; that in 1907 when plaintiff was treasurer of the company, it was made clear at a meeting of the board of directors that the company was financially well able to pay a dividend and the matter was brought up at a meeting of the stockholders but that the decedent prevented the declaration of a dividend; that the business was continually increased to such an extent that one branch of it was enlarged from a single to a double store by the purchase by the decedent of an adjoining house and improving the same at a total cost of more than \$45,000; that during the past ten years repeated demands were made on the decedent and on the company by stockholders, including plaintiff, for an inspection of the books of the company, but the demands were refused and the plaintiff was obliged to apply for a writ of mandamus and the proceeding is still pending, and the plaintiff fears that unless the holders of the judgment are enjoined they will make use of the judgment before the mandamus proceeding for an inspection of the books by the plaintiff shall be terminated; that the plaintiff, in addition to being a stockholder and treasurer of the company, was employed by it on a "weekly stipend," until after the death of the decedent as a journeyman butcher and a buyer, and that it was definitely understood by an agreement with the decedent that he was to share in the profits of the business by dividends or interest on his stock, but that instead of this, decedent took most of the earnings for improvements, and when he died left an estate of upwards of \$1,800,000, "most of which money was accumulated by him directly and indirectly from the defendant company, in which he was but an officer and stockholder, the same as this plaintiff;" that after the death of Nauss, defendants Frederick Nauss and Henry J. Hildebrand, owing to the fact that the plaintiff was demanding his rights in the company and refused to give them a voting proxy on his stock, ousted him from the company and discharged him from its employ and that his certificates of stock, which were in the possession of the executors of the decedent, were retained from him with a view to depriving him of the

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right to inspect the books, and he was obliged to bring a replevin action therefor; that the plaintiff fears that his rights and interest in the company are being jeopardized and that the holders of the judgment will make use thereof "for the purpose of forcing the defendant company out of existence" and, therefore, an injunction restraining them from so doing is necessary to protect the rights and interests of the plaintiff, and if insolvency exists a receiver should be appointed; that the plaintiff is informed and believes that "it would be readily easy" for the company at the present time to pay a dividend of twelve and one-half per cent upon its net earnings and that the profits of the company "are being unlawfully used by the said defendants Henry J. Hildebrand * * * and by Frederick Nauss;" that the judgment has been deliberately obtained "for the sole purpose of having a menacing control" over the company and its stockholders, and it continues to stand as a liability of the company, although the company is financially well able to pay it, and the purpose of so letting it stand is to cause the company and its stockholders to be powerless against the threats and doings of the defendants Henry J. Hildebrand and Frederick Nauss; that owing to the fact that the entire control of the company is in the hands of Nauss and Hildebrand, plaintiff cannot and is not allowed to have any voice or say in its management, and the officers and directors have a further plan and scheme fully to control the company so that they may become possessed of it in their individual right at a much less price than its actual value, and for this reason no dividends are paid and the money and profits of the company are being stored up and reserved for the individual benefit of its officers and directors and are not now distributed to the stockholders for the reason that the officers and directors intend "to get the whole company for themselves and when that time arrives, to have all of the profits and assets held in reserve for themselves;" that the defendants have not acted in good faith with the plaintiff as a stockholder but have acted unreasonably and in bad faith and are still so doing and have deprived and are still depriving plaintiff as a stockholder of a reasonable division of the surplus, well knowing that the company has surplus and profits which should be divided among the stockholders; that the defendants are not acting honestly toward

the stockholders in the performance of their duties as directors as required by law and act with malice aforethought toward them and such acts are now proving to be and will continue to be disastrous to the holdings of the plaintiff and other stockholders and that no demand has been made on the company to bring the suit for the reason that it would be ineffectual, since the defendants are its officers and directors in control of it.

It is well settled that whether dividends shall be declared out of surplus earnings of a corporation, or whether the surplus shall be used to increase the business or retained for the stability and security of the business, is a matter which rests in the sound discretion of the board of directors, and unless it appears that they recognize the propriety of appropriating the surplus earnings to the payment of dividends, and the majority acting in bad faith toward the stockholders have refrained from so doing, the court will not intervene for the purpose of requiring the declaration and distribution of dividends. (*Hiscock v. Lacy*, 9 Misc. Rep. 578, cited with approval in *Reynolds v. Bank of Mt. Vernon*, 6 App. Div. 62; affd., 158 N. Y. 740; *Williams v. W. U. Tel. Co.*, 93 id. 162; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun, 18. See, also, *Beveridge v. N. Y. E. R. R. Co.*, 112 N. Y. 1, 27; *Miller v. Crown Perfumery Co.*, 125 App. Div. 881.) It sufficiently appears that there is an unfriendly feeling and friction between the plaintiff and members of the board of directors who control the business of the company, and the complaint charges generally that the directors are acting in bad faith in refraining from declaring dividends, but it does not show that the directors recognize the propriety of declaring dividends, and I think it fails to show a duty on the part of the board of directors to declare dividends. It is to be inferred from some of the allegations of the complaint that the solvency of the company may depend on the validity of the proceedings in the action in which judgment may be entered on the notes, and that the plaintiff does not know whether it is solvent or insolvent. He complains that earnings were used during the lifetime of the decedent for the extension of the business which he thinks should have been distributed as dividends; but manifestly he shows no facts sufficient to impeach the

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action of those whose duty it was to determine the question. He charges that the existence "of the alleged obligations" against the company, by which presumably is meant the notes and status of the action brought thereon, renders the financial status of the company to be that of insolvency; and then he alleges not that it is solvent but that it is a prosperous going concern and he and the other stockholders should be receiving dividends. After this, however, he alleges that if the company has been unable to pay the so-called judgment, if valid, then it is insolvent and a receiver should be appointed. These allegations impliedly admit that the plaintiff does not know whether or not the company is solvent; but if it be solvent, the facts shown are not sufficient to warrant a decree requiring the board of directors to declare a dividend. The complaint should have set out the facts with respect to the assets and liabilities of the company, showing the surplus, if any, and why it is not needed in the business. A *prima facie* right to dividends should be shown by setting forth the facts with respect to the financial condition of the company and to rebut the presumption arising from the failure of the board to declare dividends that the directors have honestly exercised their discretion by showing a state of facts tending to show that they could not, acting in good faith, have deemed it necessary to refrain from declaring dividends. It is insinuated in the complaint that the decedent derived some or all of his fortune directly or indirectly from the business but no facts are alleged tending to show that he acquired money or other property from the company without consideration or otherwise improperly. It is not sufficient merely to charge bad faith.

The allegations of the complaint are insufficient to entitle plaintiff to any relief with respect to the proceedings in the action on the notes, and it will be seen that a temporary injunction with respect thereto is the most that is requested. It would seem that the plaintiff, having been treasurer of the company until after the death of Nauss, is in a position to know whether or not the notes on which the action was brought were valid. It may be observed in this connection that it appears by the verified answer of Nauss as executor, which is in the record, that the decedent held twenty-two

notes of the company aggregating upwards of \$104,000, and with the exception of one for \$3,000 they were all signed by the plaintiff as treasurer of the company. The allegations that the action was collusively brought are of no avail inasmuch as the notes on which it was brought are not impeached. It is not material why the action was brought since it must be assumed that the notes were valid. Moreover, so far as the appellant and her coexecutor are concerned, according to the allegations of the complaint, they have parted with all interest in the cause of action on the notes, and no relief is demanded or needed against them with respect thereto. The complaint teems with allegations of legal conclusions evidencing the opinion of the plaintiff in the premises, but it is quite barren with respect to allegations showing material and essential facts to warrant the intervention of a court of equity, which are misappropriation of funds, or losses through negligence of officers or directors, or fraud or bad faith or departure from charter powers. (*McHenry v. Jewett*, 90 N. Y. 58; *Petty v. Emery*, 96 App. Div. 35; *Eppley v. Kennedy*, 131 id. 1; *O'Brien v. Fitzgerald*, 6 id. 509; *affd.*, on opinion below, 150 N. Y. 572; *People v. Equitable Life Assurance Society*, 124 App. Div. 714; *Schwab v. Potter Co.*, 194 N. Y. 409.) The allegations that if the so-called judgment is valid, it ought to be paid or a settlement ought to be made with respect thereto, and that if it is not valid, it should be vacated, involve what are apparently sound business principles; but they afford no basis for determining that the directors have failed to perform their duties. It is not alleged that the directors have sufficient funds on hand with which to pay or settle for the claim referred to as a judgment. If it appeared that the company was well able to pay without the impairment of necessary working capital, and that those in charge of it were holding the claim over the company and in a position to enter judgment thereon at any time, there would be some merit in the action, but it is not shown that the company had sufficient funds available which could be spared for that purpose or that the claim was invalid. The only allegation with respect to the amount of the company's funds, other than the very general allegations, is the allegation on information and belief that the company at the present time could pay a dividend of over twelve and

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one-half per cent on its net earnings but it is not otherwise shown that it had any net earnings. It is a reasonable inference that the allegation was made with respect to the financial condition of the company, not after but before the payment of the claim for \$56,000. In so far as the allegations of the complaint tend to show that the action is brought to maintain the *status quo* pending the mandamus proceeding for the inspection of the books of the company, it needs no argument to show that a suit in equity cannot be maintained on such a theory. There is no allegation that the appellant's testator misappropriated any of the funds of the company or permitted their disbursement improperly; and no facts are alleged to sustain a right to an accounting against his personal representatives and such an accounting is not demanded unless possibly it may be said to be embraced in the general demand for an accounting of all the acts and doings of the company. We need not decide whether the allegations of the complaint sufficiently state a cause of action for equitable relief against any of the other defendants. We have only to decide whether the complaint tends to show a cause of action against any of them in equity to which the appellant is a necessary or a proper party. We have analyzed the complaint and commented thereon, not with a view to deciding whether any cause of action is stated, for that is not presented for decision, but only to point out that it states for the most part conclusions of law instead of facts and is most indefinite and why we think the appellant is not a necessary or a proper party. Charges are made against her testator for failing to pay dividends, but manifestly if dividends are to be declared, the right to have them declared depends upon the financial condition of the company now and not on its financial condition when the testator was in charge and the plaintiff acquiesced in his refusal to permit the declaration thereof, and in any event the decree of the court with respect thereto would run to the board of directors. The personal representatives of the testator are not directors; and on the allegations of the complaint they have no interest in the so-called judgment. I am of opinion that if a cause of action in equity is sufficiently stated, appellant is neither a necessary nor a proper party.

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It follows that the order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ.,
concur.

Order reversed, with ten dollars costs and disbursements,
and motion granted, with ten dollars costs.

ADAM NAUSS, Respondent, v. NAUSS BROTHERS COMPANY
and Others, Defendants, Impleaded with FLORENCE T.
HILDEBRAND, as Executrix, etc., of WENDOLIN J. NAUSS,
Deceased, Appellant, and CHARLES E. NAUSS, as Executor,
etc., of WENDOLIN J. NAUSS, Deceased, Respondent.
(Motion No. 2.)

First Department, March 4, 1921.

Pleadings — counterclaim not pleadable against codefendant which does not affect plaintiff nor relate to matters stated in complaint — one defendant cannot litigate independent cause of action with codefendant — Code of Civil Procedure, sections 521 and 1204, construed — defendant as to whom complaint dismissed cannot be retained to litigate with codefendant.

In a suit in equity by a stockholder of a corporation against the corporation and the executors of a deceased stockholder in which the complaint charges, among other things, that the appellant and her coexecutor collusively brought an action against the corporation on notes, claiming that they were valid obligations against it, pursuant to an arrangement whereby the judgment to be recovered was to be assigned to other defendants for the purpose of retaining control of said corporation; that said cause of action was assigned, and that judgment has not been entered; and that it is essential to the protection of plaintiff's interest that the holders of the alleged assigned cause of action be restrained from enforcing it, but no relief is prayed with respect thereto, a counterclaim interposed by one of the defendants, a coexecutor of the appellant, in an answer which was served on all the other defendants, cannot be sustained, where the relief sought thereby is that the said judgment be increased, that the assignment thereof be set aside or the assignees directed to reassign on being reimbursed, that his coexecutrix be removed, and that the sale of certain stock held by his testator be set aside, since the said counterclaim is founded on matters not stated in the complaint and in no manner affecting the plaintiff.

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The provisions of sections 521 and 1204 of the Code of Civil Procedure, which authorize one defendant to serve an answer on another and demand the determination of his rights as against such codefendant, do not authorize an independent litigation between the defendants to the subversion of the plaintiff's cause of action.

Moreover, since the complaint herein was dismissed as against the appellant (See *Nauss v. Nauss Brothers Co.*, No. 1, *ante*, p. 318), her coexecutor cannot be permitted to have her continued in the action to litigate matters with him which do not concern the plaintiff.

APPEAL by the defendant, Florence T. Hildebrand, as executrix, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of August, 1920, denying her motion for judgment dismissing the counterclaim of Charles E. Nauss, as executor of the estate of Wendolin J. Nauss, deceased.

Joseph H. Kohan of counsel [*Jerome Steiner* with him on the brief; *Petersen, Steiner & Kohan*, attorneys], for the appellant.

John C. Judge, for the plaintiff, respondent.

Charles A. Winter, for the respondent Charles E. Nauss, as executor.

LAUGHLIN, J.:

We have analyzed and commented upon the complaint on an appeal by this appellant from an order denying her motion on the pleadings for judgment dismissing the complaint, which was argued and is decided herewith. (*Nauss v. Nauss Brothers Co.*, No. 1, 195 App. Div. 318.) It is unnecessary on this appeal to consider the allegations of the complaint beyond their relation to the counterclaim. It appears that the plaintiff, who for many years was a stockholder and the treasurer of the defendant company, instituted this suit as a stockholder for equitable relief. The complaint in substance charges, among other things, that the appellant and her coexecutor collusively brought an action against the company on certain promissory notes, claiming that they were valid obligations against it, pursuant to an arrangement by which the judgment to be recovered therein was to be assigned to the defendants Henry J. Hildebrand and Frederick Nauss for

the sole purpose of enabling them to take control of the company; that the plaintiff as treasurer of the company was induced by one of the attorneys for the plaintiffs therein to employ a particular firm of attorneys to represent the company on the theory that it was a friendly action; that the proceedings in the action progressed to such a point that the plaintiffs were in a position to enter judgment against the company for upwards of \$56,000, but that instead of so doing they sold and assigned the cause of action to the defendants Frederick Nauss and Henry J. Hildebrand, who have not yet entered judgment. It is also alleged that it is essential to the protection of the plaintiff's rights that the holders of the assigned cause of action or claim, which notwithstanding the fact that judgment has not been entered, is referred to as a judgment, should be enjoined and restrained from enforcing it, but no relief is prayed for with respect thereto. If it may be said that the complaint in any manner attacks the validity of the cause of action on the notes, at most it only questions whether the executors or their assigns are entitled to recover the amount for which it is alleged judgment may at any time be entered. Nauss as executor served his answer on the appellant. In it he pleads a counterclaim against the defendant company and the appellant and Frederick Nauss and Henry J. Hildebrand, to whom she made the assignment, and prays that, among other things, the complaint be dismissed, with costs, and that the so-called judgment on the notes recovered by him and his coexecutrix and by them assigned to Henry J. Hildebrand and Frederick Nauss be increased to \$104,582.62 and that the assignment be set aside or that the assignees be directed to reassign on being reimbursed the amount they paid for the assignment and that the executrix be removed. The material facts on which the counterclaim is based are that he and his coexecutrix found among the assets of their testator twenty-two demand promissory notes of the defendant company, the dates and amounts of which are set forth; that the notes were duly made by the company and delivered to the decedent for value, consisting of moneys loaned and advanced and services rendered for the company and that all of the notes with the exception of one for \$3,000 were signed for the company by the plaintiff as its treasurer; that he and

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his coexecutrix brought an action on all of the notes and that one of their attorneys had been the personal counsel of the testator and the attorney and counsel for the company since its organization and was familiar with all of its affairs; that the company pleaded the Statute of Limitations with respect to the first thirteen of the notes, but that it had repeatedly admitted and acknowledged in writing its liability thereon within six years, and that said attorney, whose firm represented the plaintiffs in the action on the notes, was fully aware of the facts with respect thereto including the facts which would have defeated the plea of the Statute of Limitations, but that when the action came to trial, through collusion between this appellant and Henry J. Hildebrand and Frederick Nauss and said attorney and the attorneys for the company, no effort was made to disprove the defense of the Statute of Limitations and a verdict was directed in favor of the plaintiffs on only the last nine of the twenty-two notes, aggregating \$44,943.20, and interest thereon, making in all \$55,289.28; that the complaint was served on the plaintiff as such treasurer and he employed an attorney to appear for the company, who was selected by the attorneys for the plaintiff; that the plaintiff verified the answer and made an affidavit on which an order for the trial of the issues was obtained and the affidavit was false and suppressed the material facts known to the plaintiff with respect to the company's having so admitted its liability in writing and that the plaintiff was called as a witness on the trial to identify his signature on the notes but was not questioned with respect to said acknowledgment of the indebtedness by the company; that the testator owned 577 of the 766 shares of the stock of the company issued and outstanding, and the defendants Henry J. Hildebrand and Frederick Nauss were desirous of obtaining control of the company; that the appellant and said Frederick Nauss each took under the will of the testator a one-sixth interest in the stock and Frederick Nauss had theretofore acquired ten shares; that the stock was worth \$25 per share; that after the verdict it was proposed and planned by the appellant and the attorney for the plaintiffs in the action, who had so represented the corporation and the testator in the interest of the appellant's husband — meaning the defendant Henry J.

Hildebrand — and of the defendant Frederick Nauss that the stock be sold at public auction and that false information with respect to the term of the company's lease was given at the sale and no information with respect to its assets or the value of its trade name and good will was made public and no bidder excepting the appellant's husband appeared and the stock was sold to him for himself and Nauss at \$1 per share and $48\frac{1}{2}\%$ shares were delivered to the purchasers, which gave them a majority control, and that thereupon Frederick Nauss was elected president and Henry J. Hildebrand was elected treasurer and vice-president and they were voted an annual salary of \$5,000 each; that the value of the tangible assets of the company at that time was about \$125,000 and its trade name and good will were worth at least \$100,000 and the stock was worth \$130 per share; that as part of the collusive arrangement concerning the sale of the stock, the verdict was assigned to the purchasers thereof and the proceeds of the sale were distributed to the beneficiaries under the will of the testator; that said defendant was not aware of the facts with respect to the collusion concerning the amount of the recovery on the notes and the sale of the stock and the assignment of the verdict and relied on the advice of his said attorney, who was secretly, knowingly and intentionally serving the interests of his clients, the defendants Frederick Nauss and Henry J. Hildebrand, at the expense of and to the great damage of the estate of the testator; that the defendant as executor on behalf of the estate, so far as he is able and capable of doing so, offers to return to the defendants Henry J. Hildebrand and Frederick Nauss the amount paid by them for the assignment of the verdict and stock; and that by reason of the premises the estate has been damaged in the sum of \$100,000, and that said defendant has no adequate remedy at law.

It will thus be seen that the counterclaim is founded on matters not stated in the complaint and in no manner affects the plaintiff. By the counterclaim it is sought to *set aside* the assignment of the verdict and the sale of the stock, the sale of which is not referred to in the complaint; and to have the executrix removed; but the validity of the verdict as rendered is not questioned and with respect thereto it is

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sought to have the amount of the recovery as had sustained and largely increased. Plainly plaintiff's theory, if any, with respect to the action on the notes is that there should be no recovery at all, whereas the theory of the counterclaim is that the amount for which judgment may be entered thereon is insufficient. Respondent does not join with the plaintiff in attempting to have the verdict reduced but stands upon the prospective judgment as authorized by the proceedings in the action and demands that it be increased. It is well settled that the provisions of sections 521 and 1204 of the Code of Civil Procedure, which authorize one defendant to serve an answer on another and demand the determination of his rights as against such codefendant, do not authorize an independent litigation between the defendants to the subversion of the plaintiff's cause of action. (*Smith v. Hilton*, 50 Hun, 236; *Merchants' Nat. Bank v. Snyder*, 52 App. Div. 606; *affd.*, 170 N. Y. 565; *Bliss v. Winters*, 40 App. Div. 622; *Lansing v. Hadsall*, 26 Hun, 619; *Rafferty v. Williams*, 34 *id.* 544; *New York Life Ins. & Trust Co. v. Cuthbert*, 87 *id.* 339; *Kay v. Whittaker*, 44 N. Y. 565, 576; *Belden v. Brown*, 77 Misc. Rep. 282.) Moreover, since we are dismissing the complaint as against the appellant, her coexecutor cannot be permitted to have her continued in the action to litigate matters with him which do not concern the plaintiff. (*Laske v. Wolf*, 154 App. Div. 233; *Havana City R. Co. v. Ceballos*, 49 *id.* 421.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and appellant's motion for judgment dismissing the counterclaim granted, with ten dollars costs.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of ANDREAS GRUNSICK, Respondent, for Compensation under the Workmen's Compensation Law, *v.* CHARLES SCHAEFER & SON, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law — duration of disability — finding that claimant still disabled not supported by evidence — burden of proof — presumptions.

Evidence examined, and held, that a finding that the claimant received injuries which caused him to be disabled from the 11th of July, 1919, "to the 21st day of May, 1920, on which date he was still disabled," was contrary to the established facts in the case.

In the absence of evidence that the disabilities of the claimant persisted after the the 9th day of January, 1920, on which date the physician of the Commission reported, after examination, that the claimant should go to work, that date should be the outside limit of any award.

The burden of establishing that the disability did not end with the 9th day of January, 1920, is upon the claimant, and the presumptions provided in section 21 of the Workmen's Compensation Law have no application.

The mere fact that the claimant will not work while waiting for a large allowance does not justify the finding that the disability continues.

APPEAL by the defendants, Charles Schaefer & Son and another, from a decision and award of the State Industrial Commission, entered in the office of said Commission on the 21st day of May, 1920.

James B. Henney [*William H. Foster* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

The State Industrial Commission finds as conclusions of fact that "on July 11, 1919, while the said Andrew Grunsick was engaged in the regular course of his employment," he received injuries to his "lower spine and left shoulder, which

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injuries caused him to be disabled from the 11th day of July, 1919, to the 21st day of May, 1920, on which date he was still disabled."

Compensation was paid upon this case until the sixth day of September. Dr. Lewy made an examination of this man for the Commission on the 1st of October, 1919, and then recommended that "claimant now attempt to resume work." On the 9th of January, 1920, he made a further examination and reported that "this claimant should resume work now." Still further reporting upon this case on the 20th of February, 1920, Dr. Lewy declared, "This claimant should resume work at once," and on the nineteenth of March of the same year he again reported that "I find no organic nor functional defect in consequence of the injury, which prevents this man from resuming work," but he says he does find a cardiac defect which "may prevent this man from resuming laborious work," though he declares that "this is not due to the injury." The only evidence in contradiction of this testimony by the Commission's own physician is that of the claimant and his wife, both of whom say he cannot work, but without showing any intelligent reason why he may not do so, and the learned Attorney-General says in his brief that "the claimant seems to be holding out for a large sum of money, as he asks for \$6,000," which is clearly the reason why he refuses to work.

"The burden of establishing that the disability did not end with the 10th day of September, 1919," say this court in a very similar case (*Chimora v. International Ice Cream Co.*, 193 App. Div. 538, 539), "is upon the claimant; the presumptions provided in section 21 of the Workmen's Compensation Law have no bearing upon this situation. (*Matter of Modra v. Little*, 223 N. Y. 452, 454.)" Here the medical testimony is wholly uncontradicted. The claimant's history of the case as given to Dr. Lewy does not prove out upon examination, and the mere fact that he will not work while waiting for an allowance of \$6,000, does not justify the finding of the Commission that the disability continues.

The award appealed from should be reversed and the matter remitted to the Commission to make an adjustment in harmony with the established facts in this case. On the 9th of January, 1920, Dr. Lewy says "this claimant should

resume work now," and in the absence of evidence that the disabilities of the claimant persisted, this should be the outside limit of any award.

All concur.

Award reversed and matter remitted to the Commission to proceed in accordance with the opinion herein.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of JOSEPH STEIN, Respondent, for Compensation under the Workmen's Compensation Law, v. WILLIAMS PRINTING COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law — injury not arising out of and in course of employment — injuries received in fight initiated by claimant.

A claimant does not receive injuries arising out of and in the course of his employment, where it appears that when a fellow-servant indulged in a little horseplay with the claimant by pulling at his blouse, the claimant attempted to strike the other with a milk bottle and, failing in that, attempted to bite him and then picked up a cobblestone, when the other servant, in self-protection, struck claimant causing the injuries which are the foundation for the claim.

JOHN M. KELLOGG, P. J., dissents.

APPEAL by the defendants, Williams Printing Company and another, from an award, order and decision of the State Industrial Commission, made on the 14th day of November, 1919, allowing the claimant compensation at the rate of eleven dollars and fifty-four cents per week for the period of thirteen weeks, and continuing the case.

Jeremiah F. Connor, for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

The State Industrial Commission, by a vote of three to two, has reached the conclusions of fact that Joseph Stein was employed as a porter by the Williams Printing Company in New York; that while engaged in his regular employment, on the 15th day of August, 1919, one Raymond Schults, a fellow-employee, pushed the claimant in a playful manner, which angered the claimant so as to cause him to attempt to strike the said Raymond Schults with a milk bottle. "In protecting himself, the said Raymond Schults took hold of the arm of the claimant, and after grappling with him caused him to release the hold on the milk bottle, and the claimant thereafter tried, while in the grasp of the said Raymond Schults, to bite the latter or strike him with a cobblestone which was near at hand. The said Raymond Schults thereafter struck the claimant, causing him to be thrown against a radiator, thereby injuring the left hand and arm of the claimant, knocking out four of his teeth and bruising his thigh, and causing the claimant to be disabled with traumatic neurosis from August 15, 1919, to November 14, 1919, on which date he was still disabled."

In other words, a playful act on the part of Raymond Schults, a fellow-employee, induced the claimant to make a vicious assault with a milk bottle. The claimant himself testifies that he threw a milk bottle at Schults; Schults says that "I grabbed his blouse, I believe, and just pulled it, and I stayed there and he got sore, and he picked up a bottle and threw it. I ducked the bottle and grabbed him, and he tried to stoop, and he tried to bite my arm. I let him loose, and he picked up a cobblestone. I thought it was time to stop and I punched him." It was from this blow that the claimant was forced against the radiator, producing the injuries from which he suffers. While it is probably true that technically Schults made the initial assault in this particular instance, it appears that these men had been in the habit of going through more or less of horseplay, and there is no claim that Schults had any intention of doing anything more than had been customary. There was no such insulting conduct as in *Matter of Verschleiser v. Stern & Son* (229 N. Y. 192), nor any apparent

latent ill-will, and no reason, so far as appears, why Schults should have anticipated any trouble on account of his playful grabbing of the claimant's blouse. The claimant, on his part, appears not only to have made a vicious assault upon Schults, by the throwing of the milk bottle, but to have followed it with an effort to get hold of a cobblestone, after trying to bite Schults. It was while he was in this last act, and when the safety of Schults was fairly menaced, that the claimant received the blow which resulted in his injuries. The Workmen's Compensation Law provides for compensating injuries " arising out of and in the course of his employment, without regard to fault," on the part of the claimant, " except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another " (§ 10), and the statute is to be read in connection with this exception. There can be no doubt that the claimant's injury resulted from his effort to injure Schults. He was not in any danger from Schults; no one suggests that the claimant had anything to fear from the horseplay of Schults, and it is not contended that this playful act was interfering with the discharge of any duty which the claimant owed to the employer. He appears to have suddenly changed his attitude of playfulness and to have left the service of the employer for the purpose of injuring Schults, and he received his injuries while following out that purpose, rather than any purpose of the master. The case, it seems to us, comes within the principle of *Stillwagon v. Callan Brothers, Inc.* (183 App. Div. 141; affd. on opinion below, 224 N. Y. 714), and should follow the disposition made in that case.

The award appealed from should be reversed

All concur, except JOHN M. KELLOGG, P. J., dissenting.

Award reversed and claim dismissed.

In the Matter of the Probate of the Alleged Codicil of the Last Will and Testament of JOHN BOSSOM, Deceased.

ROSETTA KIMBALL, Individually and as Executrix, etc., of JOHN BOSSOM, Deceased, and JOHN BOSSOM, JR., Devisee and Legatee, Appellants; HENRY JOHN BOSSOM, Respondent.

Third Department, February 28, 1921.

Wills — probate — findings of lack of testamentary capacity and undue influence against weight of evidence — trial — contradicting party as witness — instruction that jury might consider failure of proponent to call doctor, third witness to will.

In a proceeding for the probate of a will and a codicil thereto, *held*, that findings of the jury that at the time of the execution of the codicil the testator was not of sound mind, memory and understanding and that the execution of said codicil was not the testator's free, unrestrained and voluntary act, were against the weight of the evidence.

A party to an action or proceeding who has gone on the stand may be contradicted and his credibility impaired by the evidence of witnesses called for that purpose without first putting the same question in form to the party.

The charge that the jury might consider the failure of the proponent to call a doctor, the third witness to the will, while not reversible error, is subject to criticism in that the jury should not be permitted to get the impression that the failure to call such witness would be proof of insanity of the testator; they should know that the statute requires but two witnesses and also that contestant could call such witness without making him his witness.

APPEAL by Rosetta Kimball, individually and as executrix, etc., and another, from a decree of the Surrogate's Court of the county of Broome, entered in the office of said surrogate on the 2d day of July, 1920, denying probate to a codicil made by John Bossom, deceased, to his last will and testament, after a trial by a jury of controverted questions of fact raised by objections to the probate of said codicil, and also from an order entered in said surrogate's office on the same day denying proponent's motion to set aside the verdict and for a new trial made upon the minutes.

George W. Eisenhart [*H. D. Hinman* of counsel], for the appellants.

John Marcy, Jr. [*Israel T. Deyo* of counsel], for the respondent.

KILEY, J.:

John Bossom, a resident of Binghamton, Broome county, N. Y., on the 6th day of March, 1902, made his will; at that time his family consisted of his wife, Catherine Bossom, to whom he left the use of his property, real and personal, during the term of her natural life; a son, Adam, \$5; a son, John Bossom, \$500. He then provided that the balance of his property should be divided into four equal shares, and the terms of its disposition was provided in said will as follows: One of said equal shares to his said son John; one to his daughter, Rosetta Kimball; one to a grandson, Henry John Bossom, contestant herein, and son of a deceased son of the testator; and the remaining one-fourth share to his said son John, as trustee for the benefit of his son Jacob Bossom during his natural life, and if any remained of the trust estate, at the time of the death of Jacob, it was to be divided equally between the said John and Rosetta aforesaid. Jacob was an incompetent person. The testator thus named and provided for all of his direct descendants living and the only representative of the one who had died. This family was German; the testator and his wife were born in Germany. The thrift and decent frugality, characteristic of that race, had, through the years that had gone before, netted this testator a property, consisting in the main of improved real estate, which produced an income sufficient for the needs of himself and his wife. It will be observed that this will is orderly, evenly arranged, and the result of a scheme, thought out by the testator, or at least so arranged as to benefit those he was to leave behind him, in equal degrees. The evidence shows that the son Adam, who had left home early, had been advanced sufficient so that the testator felt he was no longer to be considered in the division of his estate. John, upon whom was to fall the burden of his incompetent brother, was given an extra \$500. The point is not that I am now passing upon any

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claim that John Bossom did not make this will nor that he was not competent to make one, but the observation is made here to call attention to its orderly and intelligent construction along lines that denote a formulated and well-considered plan. I regard this as essential, in view of the conclusion I have reached. There came a time in 1914 when John Bossom decided to make a codicil to the will aforesaid. On May 28, 1914, he executed and published that codicil; the change it makes in the will is indicated as follows: "Whereas in and by my last Will and Testament, I did, in the third division of the third clause of said will, among other things provide as follows: 'One other portion I give and devise to my grandson, Henry John Bossom, of Syracuse, N. Y., to have and to hold the same for ever.' And whereas my said grandson, Henry John Bossom, has changed his mode of living since the making of said will, and seems to be in good circumstances and not particularly in need of funds, and whereas, my son, John Bossom, and my daughter, Rosetta Kimball, have remained in and about the City of Binghamton, New York, and have looked after and administered to the wants and comfort of myself and my wife, and rendered us valuable services without compensation, and I consider that said son and daughter are deserving of greater consideration than the other of my children, my son, Adam Bossom, having had his share of my estate long ago, Now, Therefore," etc. It must be evident from the record before us that these old people, both eighty years of age or thereabouts when this codicil was made, considered that this property which their undivided effort had accumulated belonged to them both, and Mrs. Bossom also made a will and a codicil thereto at the time the codicil in question was made. The wife, Catherine, died in July, 1914. John Bossom, the testator, died February 7, 1917. The will and codicil were presented for probate. The will was permitted to go to probate without objection. John Henry Bossom, the grandson, filed objections to the admission of the codicil to probate. Availing himself of the privilege conferred by section 2538 of the Code of Civil Procedure, he demanded a trial of the issues raised by his answer before a jury; an order to that effect was made and a trial was had. The issues tried were covered by six questions submitted to the jury,

which questions were agreed upon. A statement of these and the concessions made by the contestant's counsel after the judge's charge was delivered will show the issues without further quotation. *First.* It was conceded that the evidence justified an affirmative finding that the paper writing dated May 28, 1914, purporting to be a codicil to the last will and testament of John Bossom, deceased, was subscribed at the end thereof by him.

Second. It was conceded that the evidence justified an affirmative finding that said subscription by the testator; at the end of said codicil, was made by said testator in the presence of each of the other attesting witnesses and so acknowledged by him to said witnesses.

Third. It was conceded that the evidence justified an affirmative finding that at the time of making such subscription the testator declared said instrument so subscribed to be a codicil to his last will and testament.

Fourth. It was conceded that the evidence justified an affirmative finding that there were two attesting witnesses to said instrument, and that each of them signed his name at the end thereof at the request of the testator.

On the concessions so made by contestant the jury were directed to find affirmatively on each of the four questions as set forth above. These concessions and affirmative findings are to the effect that this codicil was executed and published in a legal manner and in compliance with the statute of this State. (See Decedent Estate Law, § 21.) This suggests the question here, which must always be answered in the negative: Can an insane person do a sane act? Of course a legal act is meant. However, passing that without answering it, the two other questions which were submitted to the jury and within the confines of which it was to consider the evidence, state all and the only issues raised by contestant's objections. They are as follows: "*Fifth.* Was the execution of said instrument by said testator his free, unrestrained and voluntary act? *Sixth.* Was the said testator at the time of the execution of said instrument of sound mind, memory and understanding?"

Those last two questions were answered by the jury in the negative, and upon such finding the surrogate entered a decree in the surrogate's office of Broome county, N. Y., denying

probate to the codicil. The proponent appeals from such decree to this court, urging three grounds why it should not be permitted to stand: *First*. That the finding of the jury is against the weight of evidence. *Second*. Error in the reception and rejection, and retention of evidence in the record. *Third*. Errors of the surrogate, prejudicial to proponent, when the case was submitted to the jury. Naturally, in the consideration of the questions submitted to the jury for its unlimited and undirected action, and upon which it found adversely to the proponent, the sixth question first suggests itself, viz.: Was this testator of sound mind, memory and understanding at the time he executed and published this codicil? We must start out with the understanding of the fact, crystallized into law, that the acts of the testator, with reference to the execution of the codicil, so far as covered by the first four questions submitted to the jury, were sane acts. This does not signify that such impetus as the affirmative holding on the first four questions may give to proponent's contention relieves them of difficulty; we must still consider the questions in the light of the evidence; and while it may be said, and practical experience and observation so advise us, that the fifth question is bound up with and involved, more or less, in the sixth. The rule is laid down for our guidance that "want of testamentary capacity and undue influence are distinct grounds on which a will may be impeached. One may be competent to make a will and yet under such restraint as to vitiate the instrument executed." (*Chambers v. Chambers*, 61 App. Div. 299.) It should be borne in mind that less capacity is required to enable a man to make a valid will than to enter into and make other valid contracts. (*Matter of Seagrist*, 1 App. Div. 615.) The reason for this rule is apparent; the will is not a contract; it usually represents the last wish, if not act, of the one departing; if it is attacked he is not here to defend his act or give a reason for it, so the court said early, in *Clapp v. Fullerton* (34 N. Y. 197): "The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust." Later the same

doctrine was affirmed. "A man's testamentary disposition of his property is not invalidated because its provisions are unequal, or unjust, or the result of passion, or of other unworthy or unjustifiable sentiments. It is natural and, therefore, usual to make provision for a child; but, under our governmental institutions, no obligation to do so is imposed upon the parent, and the presumption of validity is not affected by the failure to do so, alone. Nor is the presumption in favor of a will overcome by showing that the testator was of advanced age, or of enfeebled condition of mind or body." (*Dobie v. Armstrong*, 160 N. Y. 584.) To reach a correct conclusion on facts presenting the affirmative and the negative of conditions calling for such conclusion, rules for the consideration and interpretation of evidence were early formulated. The shortest and best that I have been able to find is found in *Delafield v. Parish* (25 N. Y. 9): "The testator [who] has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will," is a person of sound mind and memory within the meaning and intent of the Statute of Wills. The court charged, and contestant seems to rely on that rule as having been laid down by Judge DAVIES in *Delafield v. Parish* (*supra*), that the proponent had the burden of proving competency of the testator. The surrogate in *Dickie v. Van Vleck* (5 Redf. 286) directs our attention to page 97 of the opinion (25 N. Y.) where a majority of the court concur in the statement that the legal presumption is that every man is *compos mentis*, and the burden of proof rests on the party who alleges the lack of it; that he who alleges it must prove it. Of course, the whole evidence must show the testamentary capacity, even when it is not alleged. The surrogate is required to satisfy himself of that fact; but that is different from the conditions that prevail when mental capacity is made an issue; then the old rule holds. The best way to take up the evidence is as it was presented upon the trial. Under question 6 what evidence did contestant present of lack of testamentary capacity? One of the physicians who had treated him down to a short time before making this will was called. He said testator was an old man and was suffering with senile

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dementia, which he said meant old age, or weakness incident to old age, hardening of the arteries, etc.; that on three occasions covering months of treatment he called at his office, several times in the night, and asked for medicine, which he (the doctor) had given him on the first occasion. The doctor says he had it in his mouth; the evidence shows the doctor accused his patient of having the tablets in his mouth, but it does not warrant anything further. Testator told him he had lost them, and the doctor found them in his pocket; that he came in his slippers and bathrobe in the night. I think the evidence shows that he never visited testator at his house but twice; that testator came to his office alone and unattended, except, the doctor says, a few times when a nurse came with him. This last is a mistake as it was shown by uncontradicted evidence that there was no nurse employed at testator's home. A woman worked there, Mrs. Bossom was sick, and the servant went to the doctor's office as and when directed by the testator. The intercourse between the physician and testator shows beyond cavil that the testator could not well be classed among insane persons. He settled his accounts, remembered from day to day the amount of his indebtedness and questioned charges that had escaped his memory; when he complained of pain he had pain and went to his physician for relief as often and at whatever time of day or night he felt he wanted relief from that pain. He never lost his way in the night nor the day. This testimony appears in the physician's evidence. I feel that his own evidence in favor of the testator rebuts and overwhelms any evidence he gave against him. The second doctor called by contestant was brief and decisive in his replies to questions. He had seen testator on the street for some time, off and on, before he called at his office. When he did call, he looked at his tongue, felt his pulse, and claims he could not get an intelligent answer to inquiries. The doctor pronounced his condition as one of insanity. He swears he made no further examination upon which to base his conclusion; that such conclusion was based upon the observation he thus made on a few visits made to his office by the testator. Some features the doctor could see without examination, viz., that the man was in his late seventies or early eighties; that he panted, more or

less, from his exertion coming up to the second floor where his office was located, walked slowly, perhaps he was somewhat untidy; he did not answer questions readily. Two features present should not be overlooked, that this old man was a German and did not speak our language as fluently as others did; that he was at that time being treated by another physician for trouble in the head that pained him; he did not and probably did not intend to tell that fact to this physician; that he suffered pain and could not tell what it was nor its cause. The doctor's conclusion may be clear to his mind, but I must have the circumstances upon which it is based to a greater extent than here disclosed before I can reach the same conclusion. A lady testified that the testator called at one of his houses, then occupied by her, and said he was looking for his wife; this was after his wife died and some time after the will was made. The presumption does not follow that he was of unsound mind at the date previous when the will was made. Another lady testified about an occasion when she went to the house with her husband to rent a barn, and Mrs. Bossom said he was incapable of doing business, he was deaf and the lady says he did not hear what was said; it was not said in a loud voice. It cannot be concluded from that circumstance that he was insane. The other and only other incident calling for consideration, and advanced by contestant as a ground for disregarding this codicil, is what took place at the time instructions were given to the attorney for drawing the will. Mrs. Bossom said: "I want to give you all my property, I want to give it to you, and Mr. Bossom and I want to give it to you." He said: "Yes, we want to give you all our property, want to give it to you, and then when we are dead we want you to give it to Rosetta and John Bossom, Jr." In this proceeding one of the most sacred rights enjoyed by man in this nation, viz., the right to leave his property to those whom he wants to have it when he gets through, is assailed. He is not here to meet the assault. The most common instincts of intelligence and humanity suggest that a fair construction be given to what he did say; a construction that is logical, that makes for good rather than bad sense. To that end the fair construction of the position of the evidence quoted is had, if there is inserted after the words "I want to

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give you," the words "a list of." Such was what was meant, such was what was understood between the parties present. The evidence on the part of the proponent shows a picture not unfamiliar in the daily walks of life. This German man and wife with a family, raised in frugality, reaches manhood and womanhood; all leave home but two, Rosetta and John, Jr. A third is stricken and is housed in an institution in or near his home city. In 1902 this testator, weighing from 160 to 180 pounds, must have been a strong man, about sixty-eight years old, strong still with the confidence of youth; after seventy the decline must have been more rapid; he was living on the income from his property in these last years of his life; aside from his wife, there were but two that he could turn to in his joys and his sorrows, his son and his daughter; they had grown old with him; as they grew older together the circle of interest narrowed; they were thrown more upon, and became more dependent on each other. Mrs. Bossom was older than the testator; she became less strong, more often requiring increasing care. Only this son and daughter, outside of the servant hired in 1914, made them intimate companions. During all of these years the testator collected his rents, attended to taxes, repairs on his property, banked his money himself, drew it out as needed, kept his own accounts, paid his bills as they accrued, purchased the necessaries for the home, food, wood, everything needed in the household, helped care for his sick wife, wound clocks, filled stoves, carried out the ashes, went where duty or inclination called him unattended, conserved his resources. When a bill or charge seemed to him exorbitant, he said so, they had to show him; when the attorney charged him ten dollars for drawing the papers at the time of the execution of the will, he told him it was too much, that it was all he had, and requested back a dollar, and got it; when being examined for a truss he inquired the expense, met it; all of this continued for years before, at the time of the execution of the will, and after until his last illness in 1917. There seems to be no change except such as a steady growing old produces; its effect varies on different people. I am struck with the ready significance of the remark of Judge RAPPALE in *Brick v. Brick* (66 N. Y. 144): "It would be indeed strange that a person should have the

capacity to acquire a large fortune by his personal industry and intelligence, and from causes existing at the same time be held not to have sufficient mental capacity to dispose of it by will." The learned surrogate charged that the proponent had the burden of proof on the question of testamentary capacity; proponent seems to have acquiesced. That is not the law, except in the light to which I have hereinbefore referred. (*Buchanan v. Belsey*, 65 App. Div. 58.) Taking either way here, the result must be the same. Contestant urges that lack of testamentary capacity can be predicated upon the fact that he was a natural object of testator's bounty, being a grandson, and, therefore, this codicil offends against the rule laid down in *DeLafield v. Parish* (*supra*). All that case holds is that testator must know who is or might be the objects of his bounty; not that he must leave such persons his property; he may substitute the objects of his affection for the natural objects of his bounty; that is what was done in this case to the extent of changing the provision as to the contestant. Why not? Testator had not seen much of this man since he was a small boy. He was young and vigorous, holding a steady position. On the other hand, those who became closer with each passing hour were growing old with him. They were natural objects of his bounty in a nearer degree than contestant; in addition they were objects of his affection. I am satisfied that the verdict of the jury on the sixth question was error; that the evidence does not justify the finding that the testator was of unsound mind and memory when the codicil was executed. (*Horn v. Pullman*, 72 N. Y. 269; *Cheney v. Price*, 90 Hun, 238; *Calligan v. Haskell*, 143 App. Div. 574.) The fifth question, was the will the unrestrained and voluntary act of the testator, was answered in the negative by the jury. The restriction upon voluntary action is charged against the son and daughter, John, Jr., and Rosetta Kimball. It is urged that the lapse of time from making the will until the codicil was made indicates that influence was exerted to bring it about. That may be considered, but is not even presumptive. The evidence of any acts of undue influence is meager if not totally absent. The circumstantial evidence relied upon is the long and close relation and communication between father, mother,

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son and daughter; the fact that the daughter, the mother and the father were together when a servant heard conversation about the contestant, to the effect that he had money, wore diamonds, was in the burlesque show business and had too much to do with women, and that testator said he should not have any of his money for that reason. It will be observed that this grandson did not have much in common with his old grandfather, and the fact that after he heard of the change in his grandmother's will he brought a stranger from New York to find out if he could what his grandfather had done of like nature with his will, indicates that his interest was not based wholly on affection springing from relationship. It was none of his business what the grandfather did with his own so long as he did that act freely and it was not the result of misrepresentation, deceitfully or maliciously made. The evidence does not warrant the holding that the attitude of the testator was the result of deceit maliciously practiced upon him by his son and daughter, nor does it justify the finding that the knowledge he had of the things he criticised can be traced to the son and daughter. Contestant admitted that he wore a diamond when he was at his grandfather's, that he told him that he was in the theater business, and from his own evidence it does appear that he had a lady there with him from New York. None of these matters are reprehensible, none of them indicate a lack of absolute respectability, none of them convince one that the life and living of this young man were not above reproach. The grandfather was undoubtedly mistaken in his conception of what those things may denote; from his knowledge of the theatrical business he undoubtedly caught the impression, common with many younger than he, that theatrical business meant easy money for little work, with a flavor to its operation, calculated to appeal to the lower curiosity of the masses; again the dress or undress of the performers, as he had observed them, did not appeal to his moderate, conservative nature. He had a right to entertain such a conception from anything he saw or heard, provided that conception was not the result of practiced fraud and deceit. The evidence in this record in that regard "is nebulous and when subjected to a scientific test, yields little in the way of positive content." The con-

clusion reached by the jury on question 5, submitted to them, cannot be sustained. It is against the weight of evidence. Undue influence must be proved; it cannot be assumed. (*Loder v. Whelpley*, 111 N. Y. 239, 250; *Rintelen v. Schaefer*, 158 App. Div. 477; *Matter of Murphy*, 41 id. 153.) In *Matter of Donohue* (97 App. Div. 205) the court says: "We should hesitate to find that undue influence has been practiced, * * * where a will is fair and reasonable, according to the common instincts of mankind, and such as might, with propriety and justice, be made by a decedent." (*Matter of Sullivan*, 229 N. Y. 440.) A present constraint must be shown; it cannot be surmised. (*Iverson v. Iverson*, 80 App. Div. 599; *Matter of Mondorf*, 110 N. Y. 450.) Such constraint must overpower the will of the testator. (*Matter of Snelling*, 136 N. Y. 515.) A person may use reasonable and legitimate argument; the undue influence must amount to coercion and duress. (*Smith v. Keller*, 205 N. Y. 39.) Having reached the conclusion that the decree of the learned surrogate and the verdict of the jury must be reversed, I could, with propriety, stop here. However, in view of the position taken by the attorneys in their briefs and by the learned surrogate, a few suggestions are not out of order. A party to an action or proceeding who has gone upon the stand may be contradicted, and his credibility impaired, by the evidence of witnesses called for that purpose, without first putting the same question (in form) to the party. The legatees named in the will could not testify upon this trial to any conversation or transaction involving a communication with the testator. (*Matter of Kindberg*, 207 N. Y. 220; *Griswold v. Hart*, 205 id. 384.) Many of the motions made by proponent to strike out evidence were subject to the criticism that appears in *People v. Chacon* (102 N. Y. 669). The charge of the learned surrogate that the jury might consider the failure of the proponent to call Dr. Knight, the third witness to the will, and duly excepted to, would not, in a case otherwise unassailable, reverse the verdict; however, such request and charge stand upon a different ground from that in other cases. The jury should not be permitted to get the impression that the failure to call such witness would be proof of insanity of the testator; they should know that the statute requires but two witnesses and also that contestant

could call such witness without making him his witness. (*Becker v. Koch*, 104 N. Y. 394.) Again, in the interest of justice both to the contestant and proponent, the learned surrogate could forestall such a situation, which might be extremely dangerous to a righteous party, by calling or insisting that the witness be called. The surrogate, in the last analysis, must determine whether the will shall be probated or not. (Code Civ. Proc. § 2614.)

The findings of the jury on questions 5 and 6 are disapproved, and the decree of the surrogate reversed and a new trial granted, with costs to abide the event.

All concur.

Decree of the surrogate reversed and new trial granted, with costs to appellant to abide event. The court disapproves of findings of fact numbered 5 and 6.

MAX LEVINE, Appellant, v. THE COMMISSION OF PUBLIC WORKS OF THE CITY OF HUDSON, N. Y., and Others, Respondents.

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Municipal corporations — suit in equity to set aside assessment by city of Hudson for street curbing constructed under contract with State Commission of Highways — waiver of defects in procedure — compliance with city charter requiring commission of public works to give grades to abutting owners — right of abutting owners to raise question of jurisdiction when called on to pay assessment.

Where, while a resolution of the commission of public works of the city of Hudson, adopted pursuant to the provisions of the city charter, as amended, and directing owners of lots upon certain streets to set new curbing, was in effect, the city, claiming to act under section 137 of the Highway Law, entered into an agreement with the State Commission of Highways to pay for the curbing upon the streets named, to be constructed in connection with an improved highway thereon, abutting lot owners who stood by and saw the street curbing constructed by the State without making objection, will be deemed to have waived any technical defects in the procedure and to have so far estopped themselves as to make it improper for a court of equity to give relief by setting aside an assessment levied by the city for the cost of the curbing.

The commission of public works had the right to adopt the grade of the engineers doing the State work and the record filed in its office was a sufficient compliance with the law requiring the said commission to give grades to abutting owners so that they might construct the curbing themselves. While the system of financing adopted by the city seems to be of doubtful validity, still as there was no bad faith and some of the owners have acquiesced and paid their assessments and the others may raise the question of jurisdiction when called on to pay, the assessment should not be set aside.

APPEAL by the plaintiff, Max Levine, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Columbia on the 4th day of August, 1919, upon the decision of the court, rendered after a trial without a jury, dismissing the complaint.

Crandell & Graf [John L. Crandell of counsel], for the appellant.

James J. Brennan, for the respondents.

WOODWARD, J.:

The plaintiff seeks to maintain an action in equity on behalf of himself and all others similarly situated to set aside an assessment for a public work in the city of Hudson. It is somewhat difficult to understand the theory of the action, for the complaint is largely devoted to telling what the law is supposed to be, with very little reference to the equities. So far as we are able to discover, the commission of public works of the city of Hudson has attempted to levy an assessment upon the abutting owners of property upon certain streets in that city to pay for the cost of placing curbing, under the provisions of section 173 of the city charter (Laws of 1895, chap. 751, as amd. by Laws of 1905, chap. 559), and it is the contention of the plaintiff, one of such abutting owners, that the contract having been let for the doing of this work in connection with a development of the State highway system, under the provisions of section 137 of the Highway Law (as amd. by Laws of 1913, chap. 319),* the local commission of public works was without jurisdiction to make such assessment.

Assuming that this is true, and that the local commission did not have jurisdiction to make this assessment, it does not

* Since amd. by Laws of 1916, chap. 571.—[REP.]

necessarily follow that a court of equity is bound to give an affirmative judgment which might operate to impose an injustice upon those who have already paid their assessments. Very often where parties have stood by and seen improvements made for which they might legally be charged they have been held to have waived technical defects in the procedure, or to have so far estopped themselves as to make it improper for a court of equity to give relief, and we are of the opinion that this is such a case. If the commission of public works has acted without jurisdiction that fact may be asserted whenever there is an effort to collect any part of such assessment (*O'Donoghue v. Boies*, 159 N. Y. 87, 98, 99) and there is no reason why a court of equity should interpose to give immunity to a portion of the abutting owners, some of them having already acquiesced in the improvement and paid their just portion of the burden.

Section 173 of the city charter, as amended by chapter 559 of the Laws of 1905, provides that the commission shall have power by resolution to require the owner or occupant of any lot to "curb and gutter adjoining the sidewalk * * * with such material as it may prescribe therefor, under the direction of and on a grade to be established by said commission," etc., and that in case any such improvement is not made within the time specified "the commission of public works shall have the power to make, do or complete the same at a cost not exceeding the actual cost of labor and material for such proposed improvement," etc. It is then provided that a special assessment may be made against the owners and upon the lands adjoining such improvement, which shall become a lien upon the premises. It seems that on the 23d day of July, 1915, the commission of public works adopted a resolution directing that on or before the 31st day of August, 1915, the owners of lots upon the streets named should make, lay, relay, repair, grade and regrade the sidewalk in front of their lots, and furnish and set new curbstones or reset the old curbstones, all under the direction of the commission and on the grade thereinbefore fixed and established. While this resolution was in effect the city of Hudson, acting it is claimed under the provisions of section 137

of the Highway Law, and on or before the 24th day of August, 1915, entered into an agreement with the Commission of Highways of the State of New York in and by which the city of Hudson was to pay for such portion of an improved highway upon the streets involved as lay outside of the sixteen-foot center, and to pay for the curbing and any engineering expense, etc. Under the provisions of this contract it appears that the State of New York actually constructed the curbs along these streets which the abutting owners had been directed to set, and it is the contention of the plaintiff that the commission of public works, having asked the city of Hudson to enter into this contract, and having procured the work to be done under conditions which practically prevented the abutting owners doing the work themselves, as the charter provides, were without authority to make the assessment complained of in this action. The plaintiff complains that the commission of public works refused to give the grades to those who asked for them, but we are of the opinion that so far as this point is concerned the commission had a right to adopt the grade of the engineers doing the State highway work, and that the record filed in its office was a sufficient compliance with the law; but it is clear that the city of Hudson having entered into a contract with the State of New York to do this work it was not practicable, at least, for the abutting owners to attempt to do the work.

But it was within the power of the commission of public works to impose this burden, acting within the letter of the statute, and there is nothing in the record to indicate that the work which was done by the State cost more than it would have cost the abutting owners, and in the presence of such a showing there is little appeal to the equitable jurisdiction of the court. The plaintiff, and others, stood by and watched the making of this improvement in conjunction with a State system of highways connecting the city with the main thoroughfare through the State, receiving larger benefits than would have been involved in the mere placing of their curbs, and their effort to avoid an equitable contribution to this work is not calculated to move a court of equity to action, whatever may be necessary as a pure matter of law in connection with any particular assessment.

The system of financing which appears to have been worked out evidently contemplated the laying of this assessment. The State demanded, as a condition of the contract, that the cost of the work be raised and placed at the disposal of the State before the work was commenced. This involved the raising of \$30,400, a portion (or \$22,000 thereof) being raised by the issuing of certificates of indebtedness, and the remainder by borrowing \$8,400 at one of the local banks. This latter sum was, no doubt, intended to cover the item of curbs, and was expected to be returned by means of the special assessment, and while it is very doubtful whether there was justification for this makeshift, and for the levying of the assessment except in the manner specially provided by the charter of the city, there does not appear to have been any bad faith in the matter, and the fact that some of the abutting owners have acquiesced in the assessment and paid their portion, and that the remaining owners, including the plaintiff, may raise the question of jurisdiction whenever they are called upon to make payment, justifies this court in an affirmance of the judgment refusing equitable relief.

The judgment appealed from should be affirmed.

All concur; VAN KIRK, J., with an opinion.

VAN KIRK, J. (concurring):

A State highway was being constructed to the city limits of Hudson. Section 137 of the Highway Law (as amd. by Laws of 1913, chap. 319)* gives authority to the State to continue this through the city, if the city streets within the accepted route are not suitably paved; the State to construct within the city limits in the same manner as outside thereof the same width of highway being constructed to the city limits. The city may, however, petition the State Highway Commission to cover the entire width of the street. If this plan is adopted, the State pays toward the improvement the cost of the highway of the same width as that outside of the city. Should the entire width of the streets be improved, the contract

* Since amd. by Laws of 1916, chap. 571.—[REP.]

is made by the State, and it does all the work, the acceptance of the work awaiting on the approval of the authorities of the city. Upon the proper completion thereof and the notification as provided in the statute, the State Highway Commission shall certify to the common council the cost of such additional construction and such common council "shall pay the same out of moneys raised by tax or from the issue and sale of bonds as provided * * * by the general or special act governing bond issues and taxation in any such city." The statute then provides: "The provisions of the General Village Law, special village or city charters and other general or special laws relative to the pavement or improvement of streets and the assessment and payment of the cost thereof shall apply, as far as may be, to such additional construction and the assessment and payment of the cost thereof, except that the provisions of any general or local act affecting the pavement or improvement of streets or avenues in any city or village and requiring the owners, or any of the owners, of the frontage on a street to consent to the improvement or pavement thereof, or requiring a hearing to be given to the persons who, or whose premises, are subject to assessment, upon the question of doing such paving or making such improvement shall not apply to the portion of the improvement or pavement of a State or county highway the expense for which is required to be paid by the city or village to the State."

The action of the commission of public works of the city of Hudson, in levying the tax on the abutting owner, is attacked as being outside its jurisdiction and void: (1) Because abutting owners are not given opportunity to construct the curbing as provided by the charter; (2) because of failure to establish a grade line.

The right of an abutting owner to construct the gutter and curbing in front of his premises was given by statute and can be taken away by statute without infringing his constitutional rights. The State acted within its power in taking to itself the paving and improvement of streets through villages and cities of the second and third class, within the route of the State highway laid out. (See *State of Pennsylvania v. Wheeling & B. B. Co.*, 18 How. [U. S.] 421; *Stockdale v. Insurance Companies*, 20 Wall. 323, 332.) The Highway Law, as above

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quoted, did not invade any constitutional right of an abutting owner. By this section any general or local act, requiring abutting owners to consent to the improvement, or requiring a hearing to be given to abutting owners, who are subject to assessment, shall not apply. Otherwise the general or local act remains in force. The State has taken the right to make the contract and to have sole charge of the work within the city limits along such route. Necessarily the abutting owner could not set the curbing and necessarily the local authorities could not give the grade line or style of curbing. But the manner of raising the money for the city's share of the improvement is not interfered with, and the city authorities are authorized to raise the necessary funds in the manner provided by the charter for the same kind of improvement. There is nothing in the Highway Law that conflicts with the provisions of the charter as to the manner of raising these funds. The abutting property owner has no cause to complain, at least until it is shown that the tax he is called upon to pay for this particular expense incurred for curbing is larger than the cost would have been to him had he placed the curbing.

I concur with Mr. Justice WOODWARD.

Judgment affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of EMILY E. BEEMAN, Respondent,
for Compensation under the Workmen's Compensation Law,
v. THE BOARD OF EDUCATION OF PENN YAN, N. Y.,
Appellant.

Third Department, February 28, 1921.

Workmen's Compensation Law — hazardous employment — school teacher carrying on chemical experiments not engaged in hazardous occupation.

A school teacher, in carrying on chemical experiments prescribed by the Education Law, is not engaged in a hazardous employment within the meaning of the Workmen's Compensation Law.

JOHN M. KELLOGG, P. J., and H. T. KELLOGG, J., dissent, with opinion.

APPEAL by the defendant, The Board of Education of Penn Yan, N. Y., from a decision and award of the State Industrial Commission, made on the 20th day of July, 1920.

George S. Sheppard, for the appellant.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

I am unable to concur in the opinion of the presiding justice that a school teacher, in carrying on chemical experiments in the performance of her duties prescribed by the Education Law, is engaged in a hazardous occupation within the meaning of the Workmen's Compensation Law. The evidence is clear that the claimant was engaged on September 19, 1919, in instructing her class in the class room of the school in Penn Yan when an explosion occurred which resulted in her injury. The learned presiding justice suggests that "by group 25 of section 2 of the Workmen's Compensation Law* the handling of explosives and dangerous chemicals and laboratories are hazardous employments," but the reading of group 25 suggests no such idea in my mind when read in connection with the general purpose of the statute, which was to provide for compensation to those injured in carrying on industries essentially hazardous, the compensation being charged against the product and distributed as a part of the overhead costs of production. The constitutional provision (Art. 1, § 19) was adopted upon the express proviso "that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer," and where there is no business upon which such a charge may be made there is no warrant for the statute, and the provisions of section 2 are all to be read in connection with this constitutional proviso. Group 25 of section 2 (as amd. by Laws of 1917, chap. 705), when thus limited, is confined to employers engaged in the business of "the manu-

* Amd. by Laws of 1917, chap. 705.—[REP.]

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facture, storing or handling of explosives and dangerous chemicals, corrosive acids or salts, gasoline, petroleum, gun powder or ammunition; laboratories; ice harvesting, ice storage and ice distribution," for pecuniary gain. (See § 3, subd. 5, as amd. by Laws of 1917, chap. 705.)

The suggestion that an "employer" under subdivision 3 of section 3 of the Workmen's Compensation Law (as amd. by Laws of 1917, chap. 705) includes "the State and a municipal corporation or other political subdivision thereof," and that "by group 44 it is not necessary that it should be carrying on the employment for pecuniary gain," seems to me to overlook both the letter and the spirit of the act. Group 44 of section 2 (as amd. by Laws of 1917, chap. 705) refers to "employment as a keeper, guard, nurse or orderly in a prison, reformatory, insane asylum or hospital maintained or operated by the State or municipal corporation or other subdivision thereof, notwithstanding the definitions of the terms 'employment,' 'employer' or 'employee' in subdivision five of section three of this chapter," and by its terms excludes school teachers or other employees outside of the enumerated class. (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57.) Group 43 of section 2 (as amd. by Laws of 1917, chap. 705) comes nearer to a justification for this award, under the provision that "any employment enumerated in the foregoing groups and carried on by the State or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term 'employment' in subdivision five of section three of this chapter," but school teaching is not one of the employments enumerated in the foregoing groups; the handling of chemicals was purely incidental to the principal calling. "Employment," as defined in subdivision 5 of section 3 (as amd. by Laws of 1917, chap. 705), "includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith, except where the employer and his employees have by their joint election elected to become subject to the provisions of this chapter as provided in section two." An "employee," as defined in subdivision 4 (not 5) of section 3 of the act (as amd. by Laws of 1917, chap. 705), "means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or

conducting a hazardous employment upon the premises," etc., and I apprehend that a school teacher is not engaged in any of the occupations enumerated in section 2, and that a board of education is not engaged in the "principal business" of "carrying on or conducting a hazardous employment upon the premises," etc.

In *Krug v. City of New York* (196 App. Div. 226) I have discussed this general subject, and if right in that case the award here cannot be sustained.

The award should be reversed and the claim dismissed.

All concur, except JOHN M. KELLOGG, P. J., dissenting with a memorandum in which H. T. KELLOGG, J., concurs.

JOHN M. KELLOGG, P. J. (dissenting):

Claimant, who was employed by the appellant to teach biology and also to do laboratory work in its schools, lost her eye by an explosion while she was performing a hydrogen demonstration in the laboratory by pouring certain acids into a flask, because of the combination of the chemicals and the handling of them.

It is urged that school teaching is not a dangerous employment and that the appellant is not an employer within the meaning of the Workmen's Compensation Law. The evidence of the claimant as to her work in the laboratory, the nature of it and the conditions of her employment are not denied, the principal contention being that upon the most favorable view of the facts as she states them, and as the Commission has found them, there is no liability.

By group 25 of section 2 of the Workmen's Compensation Law the handling of explosives and dangerous chemicals and laboratories are hazardous employments. The word "laboratories," in the connection in which it is used, evidently means work in laboratories. The handling of explosives and dangerous chemicals is not necessarily confined to chemicals which in themselves are dangerous, but must cover those which, in the use or handling which the employee makes of them, become dangerous or hazardous. Each of two or more chemicals may, in themselves, be harmless, but, when used together, may become dangerous. An employee handling such chemicals

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falls within the act. If the claimant has overstated her laboratory work, the manner of doing it or the terms of the employment, that was a question of fact which should have been met by the employer. There being no denial of the evidence, the Commission had the right to give it the most favorable consideration, and its favorable construction of the evidence is a question of fact which we cannot review. We must, therefore, treat the claimant as an employee in a hazardous employment. The fact that the statutes of the State require the teacher in her grade to perform certain laboratory experiments and demonstrations, does not except her employer from liability but makes it clear that such work was a part of the employment.

The appellant employer is within subdivision 3 of section 3 of the Workmen's Compensation Law, which includes "the State and a municipal corporation or other political subdivision thereof," and by group 44 of section 2 it is not necessary that it should be carrying on the employment for pecuniary gain. Under subdivision 1. of section 3 of the General Corporation Law the appellant is a "municipal corporation." The school district not only includes the village of Penn Yan, but reaches out and includes a part of the adjoining towns. The Compensation Law, by requiring the school district to insure, carries with it the power to raise the premium by taxation.

We must conclude, therefore, that the claimant was an employee, the appellant the employer and the employment hazardous. The award should, therefore, be affirmed.

H. T. KELLOGG, J., concurs.

Award reversed and claim dismissed.

BEFORE STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of FILOMENA GRILLO and JOSEPH P. SALERNO, Respondents, for Compensation under the Workmen's Compensation Law, for the Death of ABRAMO DE LUCA, v. SHERMAN-STALTER COMPANY, Employer, and the STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law — evidence — foreign certificates of births and marriages not evidence of relationship between decedent and alleged widow — notice of claim to be filed by mother of illegitimate dependent children within time limited by section 28 of statute — appointment of guardian not contemplated by statute — failure to file claim within time limited.

The relationship of the claimant, a citizen of Italy, as the widow of the decedent, cannot be established by certificates of births and marriages executed in Italy by an official of vital statistics and a mayor, even though the names appear to be those of the decedent and the alleged widow, for such certificates do not come up to the requirements of evidence as specified in sections 952, 953 and 956 of the Code of Civil Procedure.

Assuming that illegitimate children have rights under the Workmen's Compensation Law, the mother is the one who should move in the matter and file a claim for compensation; the statute does not contemplate the appointment of a guardian to act for them.

The failure of the mother to file a claim for compensation on behalf of the children within the time limited by section 28 of the statute is fatal to the right to claim an award.

JOHN M. KELLOGG, P. J., dissents.

APPEAL by the defendants, Sherman-Stalter Company and another, from a decision and award of the State Industrial Commission, made on or about the 20th day of June, 1919, and also from an award of said Commission made on or about the 19th day of January, 1920.

Neile F. Towner, for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

The State Industrial Commission finds as conclusions of fact that on the 20th day of September, 1917, Abramo De Luca was drowned while engaged in his regular employment in connection with the dredging out of a portion of the Barge canal near Clyde, and that this portion of the canal was not a part of the navigable waters of the United States. It also finds that De Luca left him surviving a widow, living in Italy, with six conceded illegitimate children, dependent upon him at his death, and awards are made to each one of these. The employer and the insurance carrier appeal from the awards.

It is urged against the award made to Filomena Grillo, alleged widow, residing in Italy, that there is no competent evidence that she is the widow of the decedent. There are three certificates. The first of these is an alleged certificate of the birth of "Grillo Filomena, the daughter of Peter and Capparelli Giulia," at Acquaformosa, Italy, on the 12th day of May, 1861. This certificate is signed "D. Rossani, Official of Vital Statistics," and bears a municipal seal. The second certificate purports to be of the marriage of Grillo Filomena, daughter of Peter and Capparelli Giulia, and De Luca Abramo, son of Peter and Matrangolo Maria, and is authenticated in the same manner as the previous certificate. The third purports to be a birth certificate of the family of De Luca Abramo, consisting of the wife and one son and two daughters. This is signed by the same name, but as mayor, and has a municipal seal. It does not show any certificate of birth of the decedent, though it is recited that he was "born in this town," and aside from the likeness of names there is nothing to show that the decedent was the husband of the woman in Italy, or that she was not legally divorced from him. Section 72 of the Workmen's Compensation Law provides that "the Commission may cause depositions of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the Supreme Court," but we find no authority for accepting certificates of births and marriages and of alleged families as evidence of the fact of relationship between a man killed in America and a woman residing in Italy, even though the names appear to be those of an alleged contracting couple back in the year 1891. Sections 952, 953

and 956 of the Code of Civil Procedure specify the requirements in reference to records and documents of a foreign country entitled to be used as evidence, and it is entirely clear that these certificates by the mayor and official of vital statistics do not come up to the requirements of evidence. (*Pifumer v. Rheinstein & Haas, Inc.*, 187 App. Div. 821; *Fosket v. Buschmann Co.*, 193 id. 342, 344, and authorities there cited.) The award to the alleged widow may not, therefore, be sustained.

The award to the illegitimate children is challenged on the ground, among others, that no claim for compensation was filed with the Commission within one year from the death of Abramo De Luca, and that the claim was barred by section 28 of the Workmen's Compensation Law at the time the award was made. This provision of the statute is that "the right to claim compensation under this chapter shall be forever barred unless * * * within one year after such death, a claim for compensation thereunder shall be filed with the Commission." (See, also, Laws of 1918, chap. 634, amdg. said § 28.) Abramo De Luca died from drowning on the 20th day of September, 1917. At a hearing held at Rochester on the 31st day of December, 1918, more than a year after the death of this man, a claim appears to have been signed by the mother of these children, though attention was called at that time to the fact that the year had expired. If this mother had the right to make this claim as guardian or next friend at the time of signing this claim on the 31st day of December, 1918, she had it at all times subsequent to the death of Abramo De Luca, and her failure so to act was fatal to the claim. The statute is positive; "the right to claim compensation" is "forever barred" unless the claim is made within one year, and the only limitation upon this section is that contained in the section as amended in 1918, which does not apply here because objection was duly made, and that contained in section 116 which provides that the statute shall not run against a "minor dependent" so long as he has no "guardian or next friend." If we read this exception to require that the claim shall be filed by the legal guardian or next friend, then it appears in the record that on the 28th day of July, 1919, Joseph P. Salerno was duly appointed guardian for the said illegitimate children, and the payments are directed to be

made to him, although he has never made any claim. Assuming that the claim should have been made by the guardian appointed by the court, the exception to the rule laid down in the 28th section of the statute extends only so long "as he has no committee, guardian or next friend," and that came to an end at the date of the appointment on the 28th day of July, 1919. This guardian has taken no action, and his time to act expired on the 28th day of July, 1920.

We are of the opinion that the mother of these illegitimate children as guardian by nurture, had the right to the custody and control of their affairs. (3 Am. & Eng. Ency. of Law [2d ed.], 888.) At common law the putative father of a bastard child is not bound to support it, this legal obligation devolving upon the mother. (3 Am. & Eng. Ency. of Law [2d ed.], 889; *People ex rel. Board of Police v. Shulman*, 8 App. Div. 514, 516; *Todd v. Weber*, 95 N. Y. 181, 189, and authority there cited.) Assuming that illegitimate children, who are not looked upon as children for any civil purposes (3 Am. & Eng. Ency. of Law [2d ed.], 889), have rights under the broad humanitarianism contemplated by the Workmen's Compensation Law, it seems to us clear that the mother is the one who should move in the matter; that she is the guardian or next friend of her offspring, and that the statute did not contemplate the appointment of a guardian to act for her children. The notice of injury required by section 18 * of the act contemplates that the person injured, or any one acting for him, may give the notice, and we anticipate that a mother, whether of legitimate or illegitimate children, if living and competent to act, may make a claim and file it with the Commission. If this is true, then her failure to act within the time limited by the statute is fatal to the right to claim an award, and the State Industrial Commission was without jurisdiction of the subject-matter at the time this award was attempted to be made.

The awards in both instances should be reversed and the claims dismissed.

All concur, except JOHN M. KELLOGG, P. J., dissenting.

Awards reversed and claims dismissed.

* Since amd. by Laws of 1918, chap. 634.—[REp.]

ALLIED SILK MANUFACTURERS, INC., Appellant, v. LEOPOLD ERSTEIN and MAX ERSTEIN, Copartners, under the Firm Name of L. ERSTEIN & BRO., Respondents.

First Department, February 4, 1921.

Contracts — action for breach of factor's agreement — substantial damages not shown — measure of damages — burden of proof.

A verdict in favor of the plaintiff for nominal damages in an action for breach of an ordinary factor's agreement was justified where the plaintiff failed to establish the affirmative allegations that it "diligently endeavored to secure another factor who would perform the services that the defendant contracted to do but without success," and that it was compelled to discontinue business because of defendant's refusal to carry out the contract. If the plaintiff had obtained another factor, the difference in cost to it between such agreement and the cost under the defendant's agreement, for the duration of the later agreement, would have been the measure of damage.

The burden was on the plaintiff to show substantial damages by establishing the value to it of the contract.

MERRELL, J., dissents.

APPEAL by the plaintiff, Allied Silk Manufacturers, Inc., from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 19th day of March, 1919, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 21st day of March, 1919, denying plaintiff's motion to set aside the verdict and for a new trial made upon the minutes.

William D. McNulty, for the appellant.

Daniel P. Hays of counsel [*Hays, Hershfield & Wolf*, attorneys], for the respondents.

DOWLING, J.:

Plaintiff appeals from a judgment entered upon a directed verdict in its favor for six cents on its first cause of action, and for \$90.89 on its second cause of action. The second cause of action is based upon a balance due under an account

stated and liability therefor is admitted by the defendants. The question presented by this appeal is whether the learned trial court was correct in directing a verdict for nominal damages only upon the plaintiff's first cause of action which sets forth a claim in the amount of \$45,000 for breach of a contract whereby the defendants were to act as plaintiff's factors for the period of one year from August 26, 1912, and thereafter from year to year unless terminated by ninety days' notice in writing prior to the expiration of the first year or any year thereafter. This contract bears date August 22, 1912, and under its terms the factors were to make advances upon goods delivered to them by plaintiff to the extent of seventy-five per cent of the net value of plain goods, and sixty-six and two-thirds per cent of the net value of fancy goods. These goods, consisting of manufactured silks, were to be delivered into the possession of the defendants who were to discharge the usual duties of a factor in relation thereto. For their services the defendants were to receive from plaintiff two and one-half per cent on all net sales of goods in the possession of the defendants, together with six per cent per annum interest upon all advances made by them. The plaintiff was to make sales of goods so delivered, subject to the approval of the defendants to whom the purchase price thereof was to be paid. Defendants were to guarantee payment of such accounts as they might approve, the losses, however, to be limited to one-half of one per cent upon the net sales so guaranteed. All selling expenses were to be borne by plaintiff. It was proven that this contract was breached by the defendants about the beginning of October, 1912, and upon this record such breach was unjustified.

Upon a prior appeal to this court from a judgment for nominal damages by direction, it was held (168 App. Div. 283) that the direction was erroneous, as the breach of the contract having confessedly been due to the fault of the defendants the loss of profits, future as well as past, was recoverable providing they could be proved with reasonable certainty. All that this court then decided was that the case was one in which future profits, if sufficiently proven, were recoverable, and that error had been committed in excluding certain evidence.

Upon this trial the plaintiff attempted to make proof of the value to it of this contract with the defendants. This contract was in no respect extraordinary or unusual. It was the ordinary factor's agreement. Plaintiff contends that the contract was of value to it because the percentage of commission charged by the defendants was unusually low. The plaintiff, of course, could have established a basis for damages against the defendants if it had been obliged by the defendants' breach of this agreement to go to another factor to handle its business. If it had obtained another factor, the difference in cost to it between such agreement and the cost under the defendants' agreement, for the duration of the latter contract, would have been the measure of damage. The plaintiff did not, however, as a matter of fact, obtain another factor and its efforts so to obtain one were so limited as to demonstrate that it did not use reasonable diligence in its quest. Plaintiff's witnesses conceded that there were many firms available doing a general factor's business and it is apparent that there would have been no difficulty in obtaining a factor to take up the defendants' contract if the plaintiff in good faith desired to continue its business. Not being able to show any actual loss due to increased cost of carrying on its business because of the defendants' breach of agreement, the plaintiff is forced to rely upon the other branch of its claim for damage. Having failed to prove the allegation of the complaint that it diligently endeavored to secure another factor who would perform the services that the defendants contracted to do, but without success, plaintiff now asks solely for the value of the contract to it. Its appeal on this branch of the case depends upon the question of whether the court improperly excluded testimony which would tend to prove the value of its contract as this court heretofore held it was entitled to make proof. The sole allegation in the complaint of a breach of the agreement by the defendants is "that by reason of the refusal of the defendants to make the advances provided for in their contract, the plaintiff was unable to fulfill its contract or enter upon new ones with other silk mills and was compelled to discontinue business." Of this allegation the plaintiff made no adequate proof. It can be seen that this charge that the defendants were responsible for the abandonment of plaintiff's business

is necessarily connected with the following paragraph of the complaint alleging that plaintiff diligently endeavored to secure another factor who would act for it, but was unsuccessful. Plaintiff has not established upon this trial that the reason why it was compelled to discontinue business was because the defendants refused to make advances. On the contrary, it affirmatively appears that it suspended because it did not obtain another factor to finance its operations and that, upon this record, was due to its own lack of diligence, or of desire to continue with another factor. The plaintiff did not show that on the comparatively small operations it had carried on during the life of the contract it had made any profit or that the contract was likely to prove a profitable one. Its offer of certain statements as to business done for it by defendants was so involved and coupled with its effort to attack the account stated, that the exclusion of those statements was not error.

I am unable to find any exclusion of proffered proof requiring a reversal of the judgment, or any proof received which established more than a nominal value for the contract, or more than nominal damages for the breach. Under the theory of the complaint, and upon the proof, no actual damage had been established.

Appellant now contends that it was not incumbent upon it to show that it had used due diligence to obtain another factor to handle its business, and seeks to bring the case within the rule laid down in actions brought to recover damages for breach of a contract of employment. In the first place, plaintiff has affirmatively pleaded as part of its cause of action that it "diligently endeavored to secure another factor who would perform the services that the defendant contracted to do but without success," and it failed to establish the facts set forth in such allegation. In the second place, in a contract of employment, *prima facie* the amount of damage caused by its breach by the employer is the compensation as fixed thereby for the balance of its term. That is the necessary value of such a contract, subject to such deductions as represent the actual earnings of the employee in other service after the breach. The elements whereby the damage may be ascertained

appear upon the face of the agreement itself. But in the present case no such elements appear in the contract, and plaintiff's duty was to establish the value to it of the contract, and in my opinion it utterly failed to prove more than nominal damages.

The judgment should, therefore, be affirmed, with costs.

CLARKE, P. J., LAUGHLIN and GREENBAUM, JJ., concur;
MERRELL, J., dissents.

Judgment affirmed, with costs.

MUNICIPAL MORTGAGE COMPANY, Appellant, v. FOUR
HUNDRED SIXTY-ONE EIGHTH AVENUE COMPANY, INC., and
Others, Defendants, Impleaded with DODGE PUBLISHING
COMPANY, Respondent.

First Department, February 4, 1921.

Process — when service of summons on corporation will not be set aside because not made on proper person — facts showing that person served was managing agent — reference to take proof and report denied.

The service of a summons on a corporation will not be set aside on the ground that it was not made on a managing agent, officer or any other person authorized to receive service, where facts are established showing the exercise of the powers of a managing agent by the person who alone is in apparent charge and control of the corporation's affairs and where such facts are undisputed and the issue is sought to be raised solely by a statement of affiant's conclusion as to the agent's lack of authority.

Furthermore, a reference should not be ordered under such circumstances to take proof and report, but the motion should be decided upon the facts before the court; where the facts are undisputed it is only in a very unusual and exceptional case that the reference should be ordered to aid the court.

APPEAL by the plaintiff, Municipal Mortgage Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the the county of New York on the 21st day of December, 1920, referring the issue with respect to the service of the summons and complaint on the defendant Dodge Publishing Company and appointing a referee to take proof and report.

Harold Swain of counsel [*Benjamin G. Bain* with him on the brief], for the appellant.

I. T. Flatto, for the respondent.

DOWLING, J.:

This action was brought for the foreclosure of a fourth mortgage amounting to \$125,000 on premises 461-479 Eighth avenue, in the borough of Manhattan, city of New York. The action was commenced April 23, 1920, and the summons and complaint were served on May 4, 1920, on the Dodge Publishing Company, which was the tenant of the eighteenth floor of said building, by delivering a copy of same to Edwin M. Gamble who is claimed to have been, at the time, the managing agent of the Dodge Publishing Company. Judgment of foreclosure and sale was entered herein on November 9, 1920, and the referee appointed thereby made sale of the premises at public auction on December 1, 1920, for the sum of \$232,000, and the referee's deed upon the payment of the purchase price was delivered on December 7, 1920. On December 3, 1920, the Dodge Publishing Company obtained an order to show cause why an order should not be made vacating and setting aside in all respects the service of the summons and complaint upon it. The moving affidavit of John C. Hill, president of the Dodge Publishing Company, sets forth that "Neither an officer, director or any person in authority to receive a summons and complaint in the above-entitled action on behalf of the Dodge Publishing Company was ever served." Further that "Mr. Gamble was neither managing agent at that time [the time of the alleged service] or at any other time, and was never an officer or director of the corporation, and was never authorized and was not the proper person to be served with any legal papers in any action on behalf of the corporation, if he was served." The answering affidavits set forth the efforts made to serve the summons and complaint herein upon some officer of the Dodge Publishing Company. The president thereof, who made the affidavit upon which motion was made to vacate the service of the summons, resides in East Orange, N. J., and had not been seen at the office of his company for several months prior to the com-

mencement of the action. The Corporation Directory for the year in question gave the name of the said president as the only officer thereof, with three directors, himself, A. S. Hill and L. E. Krieg. When Miss L. E. Krieg was found she was served with the summons, but stated that she had resigned as a director of the company in 1918, and was not connected therewith in any way; that she had never known any one by the name of A. S. Hill as being connected therewith, and the only officer and director she had heard of was John C. Hill, its president. The City Directory gave the same information as to the officers and directors of the company as the Corporation Directory. Repeated efforts to find John C. Hill, president of the company, made by several parties were unsuccessful. The person in charge of the Dodge Company affairs was Edwin M. Gamble who had charge of the office and was so characterized by the girl in charge of the information desk therein. The only person to whom inquiries for information were referred was said Gamble. Gamble represented the company and gave all the directions as to the repairs and alterations in its leased premises between May 1, 1917, and October, 1918, when a great many alterations and repairs were made therein, and the only officer who ever appeared at the office was Hill, the president, who left the management of the company apparently in Gamble's hands. This is shown by the affidavit of the person in charge of the repairs and alterations in said building at the time in question. The freight superintendent in the building made affidavit that all directions in regard to the disposition of freight consigned to the Dodge Publishing Company, and orders for all night work done in connection therewith, were given by Gamble, and although Hill was known to be the president of the Dodge Publishing Company, Gamble was the only man who ever gave directions in connection with its affairs. In connection with the desire of the United States government to obtain possession of the entire building in question for war department purposes, a committee of tenants was appointed by the tenants in the building, and at meetings thereof the Dodge Publishing Company was represented by Gamble. None of these facts is disputed by any replying affidavit. So far as the affidavit of Hill is concerned, I am of the opinion that it was insufficient

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to meet the statements of facts showing the authority exercised by Gamble and upon which he was accepted by every one doing business with the company as its managing agent. The mere statement of affiant's conclusion as to the lack of authority upon the part of the alleged agent is not sufficient. (*Wamsley v. Horton & Co.*, 68 Hun, 549.) Where facts are established showing the exercise of the powers of a managing agent by the person who alone is in apparent charge and control of the corporation's affairs and where such facts are undisputed and the issue is sought to be raised solely by a statement of affiant's conclusion as to the agent's lack of authority, a reference is unnecessary and should not be ordered, but the motion should be decided upon the facts before the court; where the facts are undisputed it is only in a very unusual and exceptional case that the reference should be ordered to aid the court. (*Buchholz v. Florida East Coast R. Co.*, 59 App. Div. 566.)

The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., SMITH, PAGE and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

ESTHER POSNER, Appellant, v. AARON COHN, Respondent.

First Department, February 4, 1921.

Landlord and tenant — negligence — action against owner of leased building for injuries received by falling on sidewalk in front of building — question of fact as to whether condition existed prior to lease — question as to whether lease was fictitious.

In an action to recover for injuries received by the plaintiff when she fell on the sidewalk in front of a building which was owned by the defendant but prior to the accident had been leased to a corporation owned by the defendant's sons, the evidence examined, and held, that the complaint should not have been dismissed at the close of the case but that the plaintiff should have been permitted to go to the jury on the question whether

the defendant leased the premises with the alleged nuisance in the sidewalk in front thereof.

Furthermore, the plaintiff should have been permitted to go to the jury on the question whether the defendant, despite the alleged lease, was in fact the real owner and so remained such owner at the time of the accident.

APPEAL by the plaintiff, Esther Posner, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of June, 1920, upon the dismissal of the complaint by direction of the court at the close of the entire case.

Nathan Kelmenson, for the appellant.

Nathan B. L. Cosel [*M. A. Kursheedt* of counsel], for the respondent.

DOWLING, J.:

This action was brought to recover damages for injuries sustained by the plaintiff by reason of the maintenance of a nuisance by the defendant. Plaintiff was walking on the sidewalk in front of premises 282-286 East Broadway, in the borough of Manhattan, city of New York, carrying a child in her arms, when the heel of one of her shoes caught in an open hole in the coal hole cover in front of said premises, causing her to fall to the ground. Defendant denies that it was a coal hole cover, but admits that it is a vault light, the openings in which were intended to be covered by glass. The testimony shows that there were three holes in the said cover, which was made of smooth iron; these holes were due to the absence of glass which should have covered them and their size was given as about three fingers in diameter. The dismissal is sought to be sustained upon the ground that at the time of the accident the premises were not in the possession and control of the defendant, the owner thereof, but of a corporation, the Pikeway Realty Corporation, to which he had leased the same, and that there was no proof that the premises were in a defective condition when the lessee took possession thereof. As to the second ground, the lease to the Pikeway Realty Corporation, which is in writing, was made on January 15, 1913. The accident occurred on March 7, 1916. The trial took place on June 14, 1920. Joseph Krosonsky, a witness for plaintiff, testified that he saw the accident and

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noticed the point where she fell on the cover. He marked the spot where she fell and testified that it was her heel which went into the hole in the cover, and that the cover had been in the same condition for the past eight or ten years. In answer to a question by the trial court, he said that he was not sure that it was in the same condition for eight or ten years but he knew he walked there for sometime, that the condition was the same and that one of these covers was so smooth that anybody might have been hurt there. But in response to a question by the defendant's counsel he again swore positively that the cover was in the same condition for the past ten years. Meyer Posner, plaintiff's husband, also identified the spot where the accident took place, and said the cover was smooth and there were three openings there where the glass had fallen out. He also marked the spot, which is on the same cover identified by Krosonsky, and swore that the condition of the cover was the same for six years preceding the trial, during which he had daily opportunity to observe it as he peddled baked potatoes in front of this building and the potato peels would fall into the holes, which he said were three fingers in size. I think upon this testimony there was an issue of fact for the jury as to whether the cover in question was in the same defective condition when defendant made the alleged lease to the Pikeway Realty Corporation as it was at the time of the accident.

Furthermore, under the peculiar facts in this case as shown by the testimony of defendant's witnesses coupled with the still more significant failure to make proof of the actual nature of the transaction between the parties, I think there was a question of fact for the jury as to whether the alleged lease was in fact a leasing or whether the instrument was only a document without force and effect, never intended to operate as a lease and never in fact operating as such, the defendant being the real party in control of the premises all the time. Ordinarily, proof of a lease under seal to a corporation which entered into possession of the premises thereunder would be sufficient to divest the owner of liability for whatever happened after the tenant took possession, particularly where, as in this lease, there was a covenant that the tenant should make all repairs both to the interior and exterior of

the premises. But the defendant's own proof shows, by the defendant's son William Cohn, that the defendant is eighty-five years of age; that he owned several large properties in the borough of Manhattan; that he had three sons, one of whom is now deceased; that the officers and stockholders of the Pikeway Realty Corporation were the defendant's three sons; that the defendant was not a stockholder thereof; that the capital stock of the corporation was \$1,200 or \$1,400, although it undertook to pay \$34,000 per year rent for premises 1-9 Gouverneur street (the premises in question being so described in the lease), 102-110 Attorney street and 121-125 East Broadway, for the period of five years; that the corporation had no check account and no bank account. The witness claimed that they had books to show how much rent had been collected but they were not produced. When the question was asked as to how the company turned the rent over to the defendant objection was made by defendant's counsel and sustained. It was admitted by the witness that there was a fire in the premises in 1914 and the building was partially destroyed thereby; that it was not repaired and it was eventually demolished. The witness supposed that his father demolished the building, but he was not positive; that occurred in October, 1916. The witness was asked how much he turned over to his father as rent of the building, but he could not remember the amount nor could he tell how much rent was chargeable against this particular building out of the total rent received for the three properties. Upon the facts in this case, I am of the opinion that the motion made by the plaintiff's counsel should have been granted, that he be allowed to go to the jury, *first*, upon the question of whether the defendant demised the premises with the alleged nuisance in the sidewalk in front thereof, and, *second*, whether the defendant, despite the alleged lease, was in fact the real owner and so remained such owner at the time of the accident.

The judgment appealed from is reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., SMITH, PAGE and GREENBAUM, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ROBERTA FIELD FRANK, Respondent, v. SIDNEY B. BOWMAN
AUTOMOBILE COMPANY, Appellant.

First Department, February 4, 1921.

Landlord and tenant — when tenant required to make changes ordered by fire department as condition to issuance of permit to maintain garage.

Where a fifteen-year lease of a building constructed primarily by the landlord for the tenant for the purposes of a garage provided that if the automobile business became depressed the building might be used for stores with certain limitations, and the tenant covenanted and agreed at its own expense "to comply with and execute all lawful orders and regulations of the Board of Health, Police Department and city corporation relating to said premises," said tenant was liable for the expense of inclosing certain staircases with fire-resisting partitions and doing certain other work pursuant to an order of the fire department issued about ten years after the defendant had been in possession and as a condition to the issuance of a license to run a garage, said requirement being peculiarly the result of the very use to which the tenant was putting the building.

APPEAL by the defendant, Sidney B. Bowman Automobile Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of February, 1920, upon the verdict of a jury rendered by direction of the court, and dismissing defendant's counterclaim upon the merits, and also from an order entered in said clerk's office on the 10th day of May, 1920, denying defendant's motion for a new trial made upon the minutes.

Daniel S. Murphy of counsel [*Richard T. Greene* with him on the brief; *Greene & Hurd*, attorneys], for the appellant.

Isadore Shapiro of counsel [*Guggenheimer, Untermeyer & Marshall*, attorneys], for the respondent.

SMITH, J.:

The plaintiff, the landlord, sues the defendant, the lessee, for rent. The only answer is a counterclaim for the moneys paid by the defendant in making certain alterations to the building required to be made by the fire department of the city of New York.

The defendant held under a fifteen-year lease at about \$15,000 a year. The building was built primarily by the landlord for the tenant for the purposes of a garage. It was provided in the lease, however, that if the automobile business became depressed so that the building could not be used for a garage, it might be used for stores with certain limitations. The building evidently was one which could be adapted for stores or for business other than a garage. After the defendant had been in possession of the lease for about ten years the fire department required the defendant as a condition to the issuance of a license to the defendant to run a garage, to inclose certain staircases with fire-resisting partitions, build a fireproof partition in the fifth floor and do certain other work. The building was only five stories in height. Application was made by the tenant to the landlord to make these changes. The landlord refused. The defendant, thereupon, made them at its own expense amounting to about \$2,000, and seeks by its counterclaim to recover the moneys that it paid therefor.

The sole question in the case is whether the changes required by the fire department were changes which under the lease the defendant was required to make at its own expense. Under the 7th paragraph of the lease the lessee was required to make all necessary repairs on the outside as well as the inside of the building. The lease then reads: "And the party of the second part further covenants and agrees at its own expense to comply with and execute all lawful orders and regulations of the Board of Health, Police Department and city corporation relating to said premises."

This requirement of the fire department was a requirement of the city government. Cases have arisen involving a question as to whether the intent of the lease was to require the tenant to comply with these orders at his own expense, or whether the changes ordered were so structural as not to be within the intended requirement of the lessee to make the changes at his own expense. There have been cases where a portion of the building extended out into the street which had been permitted for many years prior and where the city required the extension to be removed. (*Herald Square Realty Co. v. Saks & Co.*, 215 N. Y. 427.) In such cases ordinarily

the landlord has been required to make the changes, and in some cases it is stated in the opinion that there was a change in the policy of the city. Cases have also arisen where the inclosures of the stairways and the building of partitions have been held to be requirements for which the landlord must pay and not the tenant. (*Bubeck v. Farmers' Loan & Trust Co.*, 180 App. Div. 542; *Younger v. Campbell*, 177 id. 403; *Higgins v. Carter's Ink Co.*, 178 id. 889.) Admittedly, however, the question is simply one of intention. It is not every new requirement that indicates a change of policy which places upon the landlord the liability for the expense of the change. If that were held, then this provision in the lease that the tenant at its own expense should comply with all the requirements of the city government would in large part be nullified. The length of the term of the lease has been held to be one of the elements in determining the intention of the parties. (*Younger v. Campbell*, *supra*.) The cost of the requirement relative to the rental required to be paid has been held to be another. But, most pertinent to this case is the fact that this landlord was not required to change this building, but the requirement was only placed upon the tenant in order to enable it to continue to make the use it desired to make of the building. (*Cohen v. Margolies*, 192 App. Div. 217. See also dissenting opinion in same case.)

In *Gould v. Springer* (206 N. Y. 647) Judge VANN says, in discussing this rule of law: "The rights and obligations of the parties depend on the lease. There was no covenant on the part of the lessors to make repairs of any character, and, hence, as between themselves and the lessee they were under no obligation to comply with the order made in 1904. [Citing cases.] While they might have been subject to an action for a penalty brought by the city that was no concern of the lessee and gave him no right to compel action by the lessors. Even if non-compliance should result in the closing of the theatre, the lessee would have no remedy against the lessors, for he had failed to protect himself against such a contingency by an appropriate covenant."

In *Gregory v. Manhattan Briar Pipe Company* (174 App. Div. 106) some floors were required by the building department to be strengthened, and it was held that the tenant was

liable for the cost of those repairs, the opinion reading: "Appellant was called on to make the building safe. The order to strengthen the floors and the need of other girders was from the use to which defendant had put these demised buildings."

In *Jacobs v. McGuire* (77 Misc. Rep. 119) a fire escape was ordered for which the lessee was required to pay. In that case the opinion reads: "I do not see, however, how the distinction which I have pointed out between the form of the leases referred to warrants our holding that the erection of a fire-escape, rendered necessary by the very use of the premises made by the tenant, was outside of the contemplation of the parties, evidenced by the agreement of the tenant to comply with the appropriate city ordinances."

The changes required as a condition of the granting of a permit to the lessee to use this building as a garage was by reason of the fact of gasoline left in the cars when they were stored there. The requirement, therefore, was peculiarly the result of the very use to which the tenant was putting the building. After the termination of the lease in five years the building may not be used for a garage, but may be used for stores or for other purposes. There is every reason in my judgment for holding that a requirement of the city departments made by reason of the very use to which the tenant is putting the building and made as a condition to the issuance of a permit for such use, should rest upon the tenant, not upon the landlord.

The judgment and order should, therefore, be affirmed, with costs.

CLARKE, P. J., LAUGHLIN, PAGE and MERRELL, JJ., concur.

Judgment and order affirmed, with costs.

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In the Matter of the Appraisal under the Transfer Tax Law of the Estate of HARRY C. HALLENBECK, Deceased.

JOHN J. HALLENBECK, as Executor, etc., of HARRY C. HALLENBECK, Deceased, Appellant; EUGENE M. TRAVIS, as State Comptroller, Respondent.

First Department, February 4, 1921.

Taxation — transfer tax — stock of domestic corporation owned by decedent pledged as collateral to another domestic corporation for loan larger than value of pledge not part of assessable assets — payment by executor of part of loan does not make excess of collateral assessable — ancillary letters.

Stock of a domestic corporation which was held by another domestic corporation at the time of the death of a non-resident in April, 1918, as collateral for a loan larger than the value of the stock, is not subject to a transfer tax under section 220, subdivision 2, of the Tax Law.

Since the tax is on the transfer of the property of the decedent as it existed at his death, the fact that the executor paid a part of the loan does not make the said stock taxable.

The fact that the decedent died resident of New Jersey and ancillary letters testamentary were taken out in this State does not alter the above rules.

APPEAL by John J. Hallenbeck, as executor, from an order of the Surrogate's Court of the county of New York, entered in the office of the clerk of said Surrogate's Court on the 30th day of June, 1920, affirming an order made by said surrogate and dated February 16, 1920, assessing the transfer tax.

Samuel Crook of counsel [*Crook & Carney*, attorneys], for the appellant.

William W. Wingate, for the respondent.

PAGE, J.:

Harry C. Hallenbeck was at the time of his death a resident of Monmouth county, in the State of New Jersey. His last will and testament was admitted to probate in that county, and ancillary letters testamentary were issued to the appellant. At the time of his death he was seized of certain real estate and possessed of certain personal property situated in the State of New York. Proceedings were instituted to

fix and assess the tax upon the transfer of these properties. There were 2,500 shares of the stock of the Hallenbeck-Hungerford Realty Corporation (a domestic corporation) which had been pledged with the U. T. Hungerford Brass and Copper Company (a domestic corporation) as collateral security for a loan of \$150,000. The appraiser found that the value of this stock was \$142,750.

The decedent owned in the State of New York an estate valued in gross at \$616,496.29; the debts, counsel fees, expenses of administration, commissions and funeral expenses amounted to \$365,910.97 which was prorated by the appraiser at .3302, thus leaving a net estate subject to tax of \$476,924.86. It thus appears that in determining the taxable estate the appraiser added the value of the pledged stock of the Hallenbeck-Hungerford Realty Corporation to the assets of the estate, and added the amount of the indebtedness for which it had been pledged and then prorated the increased liabilities.

The only question arising on this appeal is the appellant's claim that the value of the pledged stock should have been eliminated from the assets and the debt for which it was pledged from the liabilities. Or, at most, as the executor had paid after the decedent's death, and before the institution of the transfer tax proceeding \$50,000 upon the indebtedness, only the excess of the value of the stock over the amount of the debt should have been taxed.

The tax sought to be assessed in this proceeding was authorized by section 220, subdivision 2, of the Tax Law (as amd. by Laws of 1916, chap. 323),* as it was at the time of the decedent's death in April, 1918, whereby the transfer by will or intestate law of shares of stock of a domestic corporation owned by a non-resident was taxable. When, however, the stock is pledged as security for a loan, the title thereto is in the pledgee, and the pledgor only has the right of redemption, and where, as in this case, the value of the stock is less than the amount of the loan, the right of redemption, even if its situs was within this State, would have no value. The title to the tangible property not being in the decedent, and the intangible having no value, there was

* Since amd. by Laws of 1919, chap. 626.—[R.E.P.]

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nothing taxable. (*Matter of Pullman*, 46 App. Div. 574; *Matter of Ames*, 141 N. Y. Supp. 793, 795, 796; *Matter of Havemeyer*, 32 Misc. Rep. 416, 417.) The tax is upon the transfer and not upon the property. (*Matter of Penfold*, 216 N. Y. 163, 167.) It is upon the transfer of the property as it existed at the decedent's death. The fact that the executor paid \$50,000 on account of this indebtedness does not in any way make the stock taxable. (*Matter of Grosvenor*, 124 App. Div. 331, 332.)

The learned counsel for the Comptroller distinguishes the *Pullman* case from the instant case in that there was no ancillary administration in the *Pullman* case, whereas ancillary letters testamentary were taken out in this case.

In the dissenting opinion of Presiding Justice VAN BRUNT in *Matter of Pullman* (*supra*) he states that the case should be determined as though ancillary testamentary letters had been taken out. In my opinion it makes no difference whether the estate is to be administered solely in New Jersey, or ancillary to such administration, our courts shall grant letters. The question does not depend upon what may be done in the course of administration of the estate; whether the executor applies the pledged security or other assets of the estate to the payment of the debt in the exercise of the right of redemption. The question to be determined is the status of the property at the time of the death of the testator. If the testator did not have title then, there was nothing to pass and no liability to taxation would attach to after-acquired property.

The order should be modified and the value of the pledged stock eliminated from the assets of the estate and the amount of debt for which it was pledged should be deducted from the liabilities and the tax assessed correspondingly reduced, and as so modified affirmed, with ten dollars costs and disbursements to the appellant.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Order modified as directed in opinion and as so modified affirmed, with ten dollars costs and disbursements to the appellant. Settle order on notice.

THE EQUITABLE TRUST COMPANY OF NEW YORK, Appellant,
v. CHARLES A. KEENE, Respondent.

First Department, February 4, 1921.

Statute of Frauds — "sale of cable transfer of exchange," defined — sale of cable transfer of exchange as sale of chose in action — **Personal Property Law**, section 85, applied.

In banking and commercial usage and custom, a cable transfer of exchange is a term used to describe the transfer of credits between different points by cable, the person contracting to deliver such exchange contracting that he will make available by cable to the person contracting to take such exchange a credit to the amount specified at the point specified and at the time specified.

The sale of a cable transfer of exchange is the transfer of an existing credit immediately available to the seller from a third person and, therefore, a sale of a chose in action which must be in writing to be enforceable under section 85 of the **Personal Property Law**, if of the value of more than fifty dollars.

LAUGHLIN, J., dissents, with memorandum.

APPEAL by the plaintiff, The Equitable Trust Company of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of May, 1920, overruling the plaintiff's demurrer to the first defense contained in the answer.

Charles P. Howland of counsel [*Franklin P. Ferguson* with him on the brief; *Murray, Prentice & Howland*, attorneys], for the appellant.

R. Hunter McQuiston of counsel [*Henry S. Goodspeed*, attorney], for the respondent.

PAGE, J.:

The complaint alleges that on or about May 29, 1919, plaintiff and defendant entered into an agreement wherein and whereby plaintiff agreed to deliver to defendant, and defendant agreed to take from plaintiff, a cable transfer of exchange on London, Eng., in the amount of 20,000 English pounds sterling at any time during the months of June, July,

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August or September, 1919, at defendant's option, for which said cable transfer of exchange defendant agreed to pay, in dollars, to plaintiff in New York, at the rate of \$4.64 5/8 per pound concurrent with the exercise of said option; that in banking and commercial usage and custom, a cable transfer of exchange is a term used to describe the transfer of credits between different points by cable, the person contracting to deliver such exchange contracting that he will make available by cable to the person contracting to take such exchange a credit of the amount specified at the point specified and at the time specified; that in entering into the agreement above referred to, plaintiff and defendant contracted with reference to said custom and usage; performance on the part of plaintiff and failure of the defendant to exercise said option or to pay for said cable transfer of exchange in the amount of 20,000 English pounds sterling at the rate of \$4.64 5/8 per pound, by reason whereof plaintiff has been damaged in the sum of \$12,275, no part of which has been paid, and for which sum judgment is demanded with interest from October 1, 1919.

The first defense in the answer to which the plaintiff demurred is as follows:

" V. That the alleged agreement set forth in the complaint and with which it is sought to charge the defendant, is a contract to sell, or a sale of goods or choses in action of the value of Fifty Dollars (\$50.00) or upwards and is not enforceable by reason of Section 85 of the Personal Property Law in respect to the Statute of Frauds; that no part of the goods or choses in action alleged to have been sold to the defendant were actually received by him; neither was anything given in earnest by him to bind the alleged agreement, nor any part payment; neither was any note or memorandum in writing of the contract or sale signed by the defendant or any agent in the defendant's behalf."

For the purposes of this case we must assume that by custom the term " a cable transfer of exchange " is defined as stated in the complaint, and determine whether as so defined it is within the purview of section 85 of the Personal Property Law (as added by Laws of 1911, chap. 571) and hence required to be in writing to be enforceable. Let us analyze this definition

and apply it to the facts alleged instead of in indefinite general terms. The plaintiff agreed that when, during the months of June, July, August or September, 1919, the defendant should pay to it the sum of \$92,925, it would transfer by cable a credit in London, Eng., where it would be available to the defendant as a credit for 20,000 English pounds sterling. As was said by this court in *Strohmeyer & Arpe Co. v. Guaranty Trust Co.* (172 App. Div. 16, 20): "What the seller of a cable transfer does is to sell a sum of money, or a credit for a sum of money, payable at the place indicated in the contract. What the buyer does is to purchase a credit available at such place." Therefore, it is not agreed on the part of the seller that he will thereafter establish a credit for the buyer, but that there is a credit established that will be available to the buyer as soon as the cablegram is received. It is, therefore, a transfer of an existing credit of the seller in London which is transferred and made available to the buyer. A credit available to the buyer must be based upon a debt or obligation of some person or corporation in the place specified which is immediately payable to the creditor or to his order. A debt or obligation due and owing from one party to another is a chose in action. Therefore, the transaction was an agreement to sell and purchase during the time specified a chose in action of the value of more than fifty dollars, and not being in writing cannot be enforced. We are deciding this case upon the facts stated in the pleadings, and our decision is limited to them. Upon the trial of the action the evidence may establish different facts from which a different conclusion would follow.

The order overruling the demurrer to the first defense in the answer should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., and MERRELL, J., concur; SMITH, J., concurs in result; LAUGHLIN, J., dissents.

LAUGHLIN, J. (dissenting):

I am of opinion that the action is for the breach of an executory contract by which the plaintiff undertook to establish in London, Eng., a credit in English pounds sterling in favor of defendant on demand to be made during a specified period.

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It may be that the damages must be measured by the actual loss sustained by plaintiff and not by the depreciation in value of the English money. The only point now presented is whether the Statute of Frauds (Pers. Prop. Law, § 85, as added by Laws of 1911, chap. 571) required that the contract should have been made in writing. I think not. I am unable to agree with Mr. Justice PAGE that the contract was for the sale of a chose in action. I, therefore, dissent.

Order, so far as appealed from, affirmed, with ten dollars costs and disbursements.

GRAND ART FLOWER CO., INC., Respondent, v. JOSEPH
MARKOVITS, Appellant.

First Department, February 4, 1921.

Contempt — violation of injunction restraining defendant from engaging in business contrary to agreement — amount of fine where damage not shown — covenant for liquidated damages preceding covenant not to engage in business not controlling.

Where a defendant violates an injunction restraining him from engaging in business contrary to his agreement, and the plaintiff does not show any actual damage, the court is empowered by section 773 of the Judiciary Law to impose a fine not exceeding the amount of the plaintiff's costs and expenses and \$250 in addition thereto.

It was error for the court to fine the defendant \$1,000, the amount stipulated in the agreement between the parties to be deposited as security for the faithful performance of the "aforesaid conditions" of the agreement and which was to be taken as liquidated damages for a violation of the contract, since said covenant as to liquidated damages preceded the covenant not to engage in business.

APPEAL by the defendant, Joseph Markovits, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of December, 1920, adjudging the defendant in contempt of court and fining him in the sum of \$1,000 and \$10 costs.

Harry H. Oshrin, for the appellant.

Harry A. Goidel, for the respondent.

PAGE, J.:

The defendant sold his business to plaintiff, and in said agreement covenanted that he would not directly or indirectly as employer, employee or otherwise engage in or be connected with a business similar to the kind to be sold to the plaintiff for a period of five years from the 4th day of May, 1920, within a radius of fifty square blocks from the said address of 1484 Fifth avenue, Manhattan. The defendant violated this covenant and the plaintiff brought an action for an injunction and obtained an injunction *pendente lite*. Thereafter the defendant continued his violation. The court has found that such violation did defeat, impair, impede or prejudice the rights or remedies of the plaintiff.

This being a civil contempt and the plaintiff having failed to prove any actual damage from the violation of the injunction order, the court was empowered by section 773 of the Judiciary Law to impose a fine not exceeding the amount of the plaintiff's costs and expenses and \$250 in addition thereto. (*Socialistic Co-operative Pub. Assn. v. Kuhn*, 164 N. Y. 473, 475.)

The learned justice at Special Term was probably misled by a provision in the contract that a deposit was to be made by the defendant of \$1,000 as security for the faithful performance of the contract, which on a violation of the contract should be taken as liquidated damages. That provision of the contract precedes the covenant not to engage in business and reads: "In the event that said party of the first part shall not faithfully perform the aforesaid conditions, it is agreed between the parties hereto that a certain sum of One thousand (\$1,000) Dollars," etc. Therefore, that sum cannot be taken as the fixed and liquidated damages for the violation of this injunction order.

The order should, therefore, be modified by reducing the fine to \$250 and costs, and as modified affirmed.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,
concur.

Order modified by reducing fine to \$250 and costs, and as so modified affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK,
LACKAWANNA AND WESTERN RAILWAY COMPANY, Appel-
lant, v. THE CITY OF BUFFALO and Others, Respondents.

Fourth Department, January 12, 1921.

**Municipal corporations — special and local assessments — exemp-
tion of railroad property from assessment for cost of lands taken
for street purposes — vacant lot adjoining railroad right of way —
when not exempt.**

The Legislature may provide that railway property that is benefited by an improvement may be included in an assessment for the cost thereof, but if an improvement does not enhance the value of the property no assessment can be made against it.

A general exemption from municipal assessment of lands used for railway purposes will not extend to property of the company that is not in direct and immediate use for railway purposes.

A vacant lot of a railway company, adjoining its right of way and not being necessary to the enjoyment of its franchise, is subject to assessment for street purposes.

The possibility that at some future time the land may be required for switching purposes or for widening the roadbed is not such a direct and immediate use of the land as will exempt it from the assessment, where neither of the projects is comprehended in a scheme of improvement definitely adopted and about to be executed.

The property in question has increased in value by reason of the extension along it of the street, for which the assessment was levied, and the relator should pay its proportionate share of the cost.

APPEAL by the relator, New York, Lackawanna and Western Railway Company, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Erie on the 17th day of June, 1920, on the decision of the court rendered after a trial at the Erie Special Term.

J. E. Kelly, for the appellant.

William S. Rann, Corporation Counsel [*Jeremiah J. Hurley*, Assistant Corporation Counsel, of counsel], for the respondents.

Judgment affirmed, with costs, upon the opinion of TAYLOR, J., delivered at Special Term.

The following is the opinion of the Special Term:

TAYLOR, J.:

This is a proceeding to review the legality of an assessment for the cost of lands taken by condemnation proceedings for public street purposes. The improvement consisted in extending Hinman avenue in the city of Buffalo, N. Y., from Grove street to Military road, and was conducted under the revised charter* which was in force until January 1, 1916, and continued thereafter under the commission charter (Laws of 1914, chap. 217, § 146). The regularity of the proceeding is not challenged and the amount of the assessment is not complained of as disproportionate or excessive. The sole claim of the relator is that its lands are not legally liable for this assessment, and this presents the only question of law for review in this court.

The assessment was levied against a rectangular parcel of land, situate on the south side of Hinman avenue as extended, beginning at the intersection of the southerly line of Hinman avenue with the easterly line of Military road, and extending about 675 feet easterly on Hinman avenue, and about 151 feet southerly on Military road. Immediately adjacent to this strip on the south and running parallel to Hinman avenue is the relator's right of way, which is elevated about 16 feet above the level of the strip in question and is 99 feet wide. Immediately adjacent to the right of way on the south is still another rectangular parcel of land belonging to the relator, being of the same length as the first described parcel and about 100 feet in width. These parcels are designated on a map which was received in evidence as parcels "A," "B" and "C," respectively. Originally the three parcels constituted a single rectangular block of land and were acquired by the railway company by purchase from Jacob Layer, by deed dated October 7, 1882. The road was constructed in 1882 and 1883 and is a double-track line. Part of parcel "A,"

* See Laws of 1891, chap. 105, § 417 *et seq.*, as amd.; now Laws of 1914, chap. 217, § 215 *et seq.*, as amd.—[REP.]

which is the parcel against which the assessment in question was made, was excavated and the earth taken therefrom used to build the embankment of the right of way; but the relator has since that time permitted the land to be used for a dumping ground, by reason of which it is now practically all filled to the level of the street grade.

The claim of the relator is that parcel "A" was purchased and has been used for railway purposes exclusively, and hence is exempt from local assessment; that it was actually used in building the embankment of the right of way; that it might be needed and used at some future time for switching purposes; and that a portion thereof might be needed at some future time for widening the abutments of the right of way. In other words, the relator claims that the said parcel is held to a public use, that the company has derived and will derive no benefit from the improvement, and that it was improperly assessed therefor.

The respondent city of Buffalo, on the other hand, claims that parcel "A" is vacant land of the railway company, not within its right of way, and not needed in the enjoyment and use of its franchise; that while in 1882 and 1883 excavations were made in parcel "A" and the earth used in the construction of the embankment of the right of way, the lands have long since been refilled and have resumed their original character of excess lands not necessary or essential to the exercise of the company's franchise; that if parcel "A" should ever be used for switching purposes, its value has been enhanced by reason of the improvement, and it should, therefore, bear its just and proportionate burden of the cost; that the land in question may be sold to individuals like any other private property; and finally that the Legislature has expressly enacted that no lands in the city of Buffalo shall be exempt from local assessment. (Laws of 1914, chap. 217, § 141.)

There is no question but that the Legislature may provide that railway property that is benefited by an improvement may be included in an assessment for the cost thereof. (*Lake Shore & Michigan Southern R. Co. v. City of Dunkirk*, 65 Hun, 494; *affd.*, 143 N. Y. 660.) But if an improvement does not enhance the value of property no assessment can be made against it. (*People ex rel. New York, W. & B. R. Co. v. Waldorf*,

168 App. Div. 473.) In that case a railway station was held not liable to an assessment for the improvement of an adjacent street. And the courts have quite uniformly held that the roadbed or right of way of a railroad may not be assessed for the cost of improvements to adjacent property. (*Matter of City of New York, East 136th St.*, 127 App. Div. 672.) This is for the reason that the roadbed is held for a public use and its value for such use is not enhanced by the improvement.

In the case at bar the situation is different. The relator's property which was assessed for the extension of Hinman avenue is not along its right of way, and is not being used in the exercise of its franchise, or for any public use. It consists of a block of vacant ground fronting on the new street, and is not necessary — certainly not indispensably necessary — to the enjoyment of the company's franchise. A general exemption from municipal assessment of lands used for railway purposes will not extend to such property of the company as is not in direct and immediate use for railway purposes. (See 28 Cyc. 1121, and cases there cited.)

Parcel "A" is not at present essential to the enjoyment of the relator's franchise. It is possible that at some future time the company in the exigencies of its legitimate business may require it for switching or other purposes. But it is not now so irrevocably appropriated to the use of the public that it might not be applied to other uses or sold. (*Yates v. Van DeBogert*, 56 N. Y. 526.) In *Morris Railway Co. v. Jersey City* (35 Vroom, 148; *affd.*, 65 N. J. L. 683) it was said: "The theory on which the prosecutors seek to be relieved of these assessments is that the land was bought for railroad purposes and in the future may be required for such purposes. In the absence of proof that the project * * * is within a scheme of improvement adopted and about to be executed, the company will not be relieved from these assessments on that ground."

The reasoning of the learned court in that case applies here. The relator has offered testimony to show that at some future time it might decide to lay four tracks along its right of way; in which case it would need to appropriate fifteen to twenty feet of the land in question for abutments. It has also offered testimony to show that the land in question might at some

future time be advantageously used for switching purposes. These are mere possibilities of future user and are not such a direct and immediate use of the land as will exempt it from this assessment. Neither of these projects is comprehended in a scheme of improvement definitely adopted and about to be executed. It is true that plans for eliminating grade crossings as prepared by the grade crossing commissioners and approved by the relator have provided for increased trackage along this right of way, but there is nothing in the evidence to show that there is any present intention on the part of the relator to carry out such plan. The outstanding fact is that this vacant land is not now dedicated to any public use and the relator can sell it to private owners at any time without impairing or violating any duty it owes to the public. If this assessment is set aside and the company afterwards sells the property, it will have reaped all the benefits of the improvement without paying a dollar for the enhanced value. This would be inequitable and unjust.

There can be no question that this parcel of land has increased in value by reason of the extension of Hinman avenue. The improvement has given the land an additional street frontage along its entire length. This being so, no good reason can be perceived why the relator should not pay its proportionate share of the cost. If it decides to sell these lands, it will presumably recoup for the cost of the improvements in the enhanced price, having at all times the option to retake for the public use by purchase or condemnation. If it decides to hold the lands in anticipation of future requirements, it should still pay its just and proportionate share of the cost of improvements which have added to the value of the lands; for in that case the lands are not actually dedicated to the public use and are classed the same as any other species of private property.

For the reasons above stated I am of opinion that the assessment in question was properly made and should be confirmed.

So ordered.

CHARLES KRISER, Respondent, v. JOHN C. RODGERS, JR., and
EUGENE F. MCGEE, Defendants, Impleaded with MARTHA
M. RODGERS, Appellant.

First Department, February 4, 1921.

Judgments — entry of judgment against defaulting joint debtor erroneous where action not severed — severance of action after judgment entered does not cure error — vacating judgment entered by mistake.

Where in an action on a promissory note the maker is not served and the payee defaults, it is improper to enter judgment against him without entering an order of severance.

An order subsequently entered severing the action does not correct the error, but the proper practice is for the plaintiff to move to vacate the judgment, if it was entered through mistake, and then either sever the action as to the defaulting defendant or proceed to trial, and if successful, apply for a direction of judgment against all the defendants sued, and if unsuccessful the court may grant judgment in favor of the defendants who appeared and litigated the issue and against the one who defaulted.

APPEAL by the defendant, Martha M. Rodgers, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of December, 1920, granting plaintiff's motion to sever the action and allow the plaintiff to proceed against certain defendants.

Thomas E. O'Brien of counsel [*Thomas F. Conway*, attorney], for the appellant.

Leon Brof of counsel [*Ginzburg & Picker*, attorneys], for the respondent.

PAGE, J.:

The action was brought to recover upon a promissory note. The maker has not been served. The payee defaulted, and the plaintiff without entering an order for severance, entered judgment against him on July 27, 1920. Thereafter a notice of trial was served by the plaintiff on the attorney for the indorser who had appeared, and a motion was made to place

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the cause on the special calendar, Trial Term, Part II, for trial. In opposition to this application the appellant urged the objection of the entry of judgment against one defendant without severing the action. Thereupon, the plaintiff moved for an order severing the action *nunc pro tunc*. The order entered on the motion does not sever the action *nunc pro tunc* as of July 27, 1920, but *in presenti*.

The action being at law only one judgment could be entered unless the action is severed, as provided in section 456 of the Code of Civil Procedure. The order of severance should precede the entry of judgment, the theory of the law being that where parties are severally liable they may, at the option of the plaintiff, be united in one action or separately sued. Therefore, when plaintiff is in position to take judgment against some, but not all of the defendants, he should be allowed to separate the action into two actions, enter judgment in one and proceed with the other.

The judgment was improperly entered. The plaintiff's attorney alleges that it was so entered through his inadvertence and mistake. The proper practice is for the plaintiff to apply to vacate the judgment. (*Weston v. Citizens' Nat. Bank*, 88 App. Div. 330, 336.) He can then either sever the action and properly enter judgment against the defendant in default, or he may proceed with the trial, and if successful, apply to the court upon the trial for a direction of judgment against all the parties defendant who have been sued. (Code Civ. Proc. § 1214.) If unsuccessful the court may grant judgment for the defendant who appeared and litigated the issue and for the plaintiff against the defaulting defendants. (Code Civ. Proc. § 1204.)

The order will be reversed, without costs, and the motion denied.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,
concur.

Order reversed, without costs, and motion denied.

HARRY BRANDORFF, Respondent, v. RODGERS & HAGERTY, INC., Appellant.

First Department, February 4, 1921.

Railroads — action for injuries received while walking on track by being struck by locomotive — verdict contrary to law of case laid down in charge.

In an action for personal injuries the plaintiff claimed that, while walking south upon a track upon which trains had theretofore been run in a northerly direction, there being two tracks for the operation of trains, he was struck in the back by a locomotive because of the negligent operation thereof by the defendant's employees. The court charged the jury that the burden rested on the plaintiff to prove "that the track on or near which he was injured was not in general use, or if used was used for trains only going in the opposite direction to that in which the plaintiff was walking."

Held, on all the evidence, that a verdict for the plaintiff was contrary to the law of the case as laid down by the court in its charge.

APPEAL by the defendant, Rodgers & Hagerty, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of July, 1920, upon the verdict of a jury for \$22,500, subsequently reduced to \$14,500 on stipulation, and also from an order entered in said clerk's office on the 22d day of July, 1920, denying defendant's motion for a new trial made upon the minutes.

Bertrand L. Pettigrew of counsel [*W. L. Glenney* with him on the brief], for the appellant.

William Godnick of counsel [*Jay S. Jones* and *Fred Francis Weiss* with him on the brief; *Bick, Godnick & Freedman*, attorneys], for the respondent.

PAGE, J.:

The action was to recover damages for injuries sustained by the plaintiff by reason of the alleged negligent operation of a locomotive by defendant's employees on the site of the "Army Base" in Brooklyn.

The plaintiff's claim was that he was struck in the back of the right leg by a locomotive while walking south upon a track upon which trains theretofore had been run in a north-

erly direction, and that there were two tracks for the operation of trains. The testimony of the defendant's witness was to the effect that the plaintiff was walking close to the track in a northerly direction with his head down and was struck in front by the locomotive. The proof very strongly preponderated in favor of the defendant. It appeared from photographs, one taken seven days before and the other eight days after the accident, that there was only a single track upon which trains were operated in both directions. The testimony of the plaintiff and his witness Feingold is almost unintelligible, by reason of their lack of knowledge of the English language. Some of their testimony was given through an interpreter; had all of it been so taken, a much better result would have been obtained.

The court charged the jury that the burden rested upon the plaintiff to prove "that the track on or near which he was injured was not in general use, or if used was used for trains only going in the opposite direction to that in which the plaintiff was walking." It was proved that there was a main track running from the dump at Sixty-ninth street northerly to a point about 300 feet beyond a switch; that from the switch a branch track ran in a southeasterly direction into an excavation; that cars loaded with dirt were drawn up from the excavation by two locomotives, one in front of the other, and when the train was upon the main track one engine was disconnected and an engine coming from the dump was attached to the front of the train and it was taken to the dump with one engine in front and one behind. The unattached locomotive then returned by the branch track to the excavation. There was no unused track nor were there two tracks on one of which the trains operated only in one direction. The verdict for the plaintiff was, therefore, contrary to the law of the case as laid down by the court in its charge.

The judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

ELVIRA SINCLAIR, Appellant, *v.* LYDIA M. PURDY, Individually and as Administratrix, etc., of ELIJAH F. PURDY, Deceased, and Others, Respondents.

ELVIRA SINCLAIR, Appellant, *v.* LYDIA M. PURDY, Individually and as Administratrix, etc., of ELIJAH F. PURDY, Deceased, and Others, Respondents, Impleaded with JENNIE A. MAPES, Appellant, and GUY DALY and Others, Defendants.

First Department, February 4, 1921.

Trial — action for partition — right of parties to have issues stated for trial by jury though case noticed for Equity Term — practice in First Judicial District.

In an action for the partition of real property of a decedent the parties are entitled of right to have issues tried by a jury, though the case is properly noticed for trial at an Equity Term.

Where issues in a partition action in the First Judicial District are ordered to be tried by a jury, a certified copy of the order should be filed with the calendar clerk of the Trial Term, who must put the case on the calendar as provided by rule 5 of the Trial Term rules, and upon the verdict being rendered the same must be certified by the clerk to the court at Special Term.

An application may then be made at Special Term, Part III, for an interlocutory judgment and the court may then find the uncontroverted facts, together with the facts found by the jury, and make the conclusions of law thereon, and direct an interlocutory judgment to be entered pursuant to section 1546 of the Code of Civil Procedure.

No issue should be stated as to the wills involved in the action since their terms are plain and unambiguous, and the decrees admitting them to probate are conclusive in this action; the legal effect of the wills is for the court to determine and not the jury.

APPEAL by the plaintiff, Elvira Sinclair, in the first entitled action, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of November, 1920, denying plaintiff's motion for a jury trial of the issues raised by the pleadings.

Appeal by the plaintiff, Elvira Sinclair and by the defendant, Jennie A. Mapes, in the second entitled action, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New

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York on the 8th day of December, 1920, denying plaintiff's and said defendant's demand or motion for an order directing that the issues raised by the pleadings in said action be tried before a jury at a Trial Term.

George W. Olvany of counsel [*Henry A. Vieu*, attorney], for the plaintiff, appellant.

Vincent S. Lippe, for the defendant, appellant.

George H. Corey, for the respondents.

PAGE, J.:

The action is for the partition of certain real estate in the county of New York. Issue was joined by some of the defendants serving answers. Other defendants defaulted, and a guardian *ad litem* for infant defendants served the usual answer submitting their rights.

The case was noticed for trial by the plaintiff at Special Term, Part III. When the case was called for trial the attorney for the defendant Mapes requested an adjournment to enable him to apply at Special Term, Part I, for an order directing the issues to be tried by a jury, which was granted. Thereafter, the plaintiff moved at Special Term, Part I, for an order framing issues for trial by a jury. The motion was denied on the ground that the better practice, as stated in *Southack v. Central Trust Co.* (62 App. Div. 260), was to move at Special Term, Part III. The plaintiff then moved at Part III. The same justice who had heard the motion at Part I was presiding and denied the motion. The plaintiff appeals from this order. The case was subsequently called for trial, and the plaintiff and the defendant Mapes again moved for trial of the issues by a jury. The motions were denied upon the ground that the plaintiff had waived any right to a jury trial by noticing the case at an equity term, and that the counterclaim of the defendant Mapes raised purely equitable issues. The plaintiff and the defendant Mapes appeal from this order.

An action for partition is an equity action and the case was properly noticed for trial at Special Term, Part III. Section 1544 of the Code of Civil Procedure, which relates to actions for partition, provides: "An issue of fact joined in the action

is triable by a jury. Unless the court directs the issues to be stated, as prescribed in section 970 of this act, the issues may be tried upon the pleadings."

Section 970 provides: "Where a party is entitled by the Constitution, or by express provision of law, to a trial by a jury, of one or more issues of fact, in an action not specified in section nine hundred and sixty-eight of this act, he may apply, upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated, is conclusive in the action unless the verdict is set aside, or a new trial is granted."

A certified copy of the order for the trial of the issues should be filed with the calendar clerk of Trial Term. It is the duty of such clerk to put the case upon the calendar as provided for by rule 5 regulating the practice of Trial Terms of the Supreme Court in the First Judicial District in New York county. Upon the verdict being rendered upon such issues the same must be certified by the clerk to the court at Special Term. Whereupon an application may be made at Special Term, Part III, for an interlocutory judgment. The court may then find the uncontroverted facts, together with the facts found by the jury, and make the conclusions of law thereon and direct an interlocutory judgment to be entered pursuant to section 1546 of the Code of Civil Procedure. (*Southack v. Central Trust Co.*, 62 App. Div. 260.)

In framing the issues to be tried, no issue should be stated with reference to the wills of Elijah F. Purdy or of Elvira Purdy. The wills are plain and unambiguous. They have been admitted to probate by the Surrogate's Court having jurisdiction, and the decrees admitting them to probate are conclusive in this action. (*Wadsworth v. Hinchcliff*, 218 N. Y. 589.) The legal effect of the provisions of these wills is for the court at Special Term, and not for a jury to determine.

The orders will be reversed, with ten dollars costs and disbursements to the appellants in each case, and the cases remitted to Special Term to make a proper order framing the issues to be submitted to the jury.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,
concur.

Orders reversed, with ten dollars costs and disbursements, and cases remitted to the Special Term to make a proper order framing the issues to be submitted to the jury.

**YANGTSZE INSURANCE ASSOCIATION, LTD., Respondent, v.
STARK & COMPANY, INC., Appellant.**

First Department, February 4, 1921.

Pleadings — bill of particulars of defense of payment denied.

An order for a bill of particulars of the defense of payment will not be granted unless very special reasons appear. Accordingly such a bill will not be granted in an action to recover a balance alleged to be due on insurance premiums where the plaintiff did not state the details of the account between the parties and it appeared that the transactions between them covered several thousand policies of marine insurance, the premiums on which varied from a few cents to \$200, and that monthly settlements were made between the parties.

APPEAL by the defendant, Stark & Company, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of September, 1920, granting the plaintiff's motion for a bill of particulars of the defense of payment.

Morris Alfred Vogel of counsel [*Vogel & Marion*, attorneys],
for the appellant.

Ira L. Anderson of counsel [*Barker, Donahue, Anderson & Wylie*, attorneys], for the respondent.

PAGE, J.:

This order is erroneous and should be reversed. It is contrary to our practice to grant bills of particulars of defense of payment, unless very special reasons appear why such order should be granted. (*Ebin v. Equitable Life Assurance Soc.*, 177 App. Div. 458, 459.) In *Sittig v. Cohen* (130 App. Div. 689) the action was brought by the assignee of an Alabama bank to recover on a judgment recovered in that State nine years before the assignment. The answer alleged upon information and belief that before the commencement of the action, the defendant satisfied and discharged the plaintiff's alleged claim by payment thereof to the bank. A bill of particulars of this defense was ordered. *Lynch v. Dorsey* (98 App. Div. 163) was an action by an executrix upon a judgment recovered in 1889 by the testator. The answer alleged that eleven years after the judgment was recovered, the testator instituted proceedings supplementary to execution; that a referee reported that certain sums had been paid to the attorney for the testator, and that the judgment should be canceled. The court refused to confirm the report and ordered the payments to be credited on the judgment. The court held that as the plaintiff was ignorant of the facts and under an obligation to enforce the claim for the benefit of the estate, if a just one, she was entitled to know particularly when and to whom the money was paid so that she could be prepared at the trial to contest either the fact of payment or the authority of the person to whom the alleged payment was made.

In the present case between January 1, 1916, and January 1, 1919, over 15,000 separate and distinct policies of marine insurance were issued, the premiums on which varied from seven cents to \$200, the total amounting to over \$10,000. A statement of the policies issued each month and the amount of premiums due thereon was sent to the defendant by the plaintiff's New York agents, and within ten days thereafter a check was forwarded by mail to the said agents. The plaintiff has sued for a balance due of \$3,872.49, without stating the details of the account. To comply with the order it would be necessary for the defendant to state a full account showing the debits and credits. The same corporation is still the New York agent of the company; its treasurer verified the affidavit on

which the application for the bill of particulars was made. There are no special circumstances that would warrant a departure from our usual rule.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

DAVIS BROTHERS REALTY CORPORATION, INC., Appellant, v.
CHARLES E. HARTE, Doing Business as the MUTUAL TOWEL
SUPPLY COMPANY, Respondent.

DAVIS BROTHERS REALTY CORPORATION, INC., Appellant, v.
GEORGE W. BAYLIS and ALBERT E. FROST, a Copartnership,
Doing Business under the Name of GEORGE W. BAYLIS &
Co., Respondents.

First Department, February 4, 1921.

Summary proceedings — what constitutes factory within meaning of Labor Law, section 2 — right to maintain summary proceedings where tenant fails to perform covenant to make repairs or obey orders of municipal officers or departments — ejection proper remedy.

A building consisting of a cellar and five stories is a factory within the meaning of the Labor Law, section 2, where the three top floors are occupied by a tenant engaged in the manufacture of chemicals and perfumery sachets and employing about ten people at labor, and the second story is occupied by tenants engaged in the towel supply and printing business and employing about five men.

Summary proceedings cannot be maintained to dispossess a tenant for failure to obey orders of the fire department of the city directing the landlord to comply with certain requirements of the Labor Law respecting the windows on the fire escape and the construction of doors opening thereon, and orders of the bureau of buildings directing the landlord to inclose the elevator shaft, though the lease contains a covenant providing for forfeiture for failure to obey said orders and regulations, for a failure to obey said orders is not among the grounds for removal of a tenant specified in section 2231 of the Code of Civil Procedure.

Said summary proceedings cannot be sustained under section 94 of the Labor Law, since by the terms of the lease the tenant was under no duty to comply with the Labor Law, but merely "all lawful orders and regulations" of the board of health, police department and city corporation, or other lawful authorities. Said covenant does not mean a duty imposed by statute but refers to orders and regulations made by subordinate departments of municipalities or other authorities which exercise regulatory police power.

While, if there was a breach of the covenant, the landlord had an option to terminate the lease, the breach was not in the nature of a conditional limitation on the demised term, and, therefore, the landlord cannot base his claim to resort to summary proceedings upon the theory that the lease has expired; under such circumstances ejectment is the proper remedy.

APPEAL by the plaintiff, Davis Brothers Realty Corporation, Inc., in each of the above-entitled actions, from an order and determination of the Appellate Term, entered in the office of the clerk of the county of New York on the 24th day of June, 1920, reversing final orders of the Municipal Court of the City of New York, Borough of Manhattan, First District, dispossessing respondents from 47 Warren street, borough of Manhattan.

Arthur J. Brothers of counsel [*Epstein & Brothers*, attorneys], for the appellant.

William J. Smith of counsel [*William P. Dalton* with him on the brief; *Dean, King, Tracy & Smith*, attorneys], for the respondents.

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The building No. 47 Warren street consists of a cellar and five stories. The top three stories are occupied by the tenants Baylis and Frost and the second story by the tenant Harte, where they carry on business. Baylis and Frost manufacture chemicals and perfumery sachets, employing about ten people at labor. Harte and his subtenant are engaged in the towel supply and printing business and employ about five people at labor. The building was, therefore, a "factory" within the definition of the Labor Law (§ 2, as amd. by Laws of 1917, chap. 694), and the provisions of that statute are applicable to this building and the several portions thereof occupied by the aforementioned tenants.

The premises, in April, 1919, were owned by the Rector,

Churchwardens and Vestrymen of Trinity Church, who in that month leased the premises to the said tenants by separate leases, containing identical covenants with terms commencing on May 1, 1919, and ending May 1, 1922. On November 11, 1919, the Rector, Churchwardens and Vestrymen of Trinity Church conveyed the premises and assigned the leases to the landlord, appellant.

The leases contained the following covenants: "That the tenant will not * * * under the penalty of forfeiture and damages, and will promptly comply with and execute all lawful orders and regulations of the Board of Health, Police Department and City Corporation, or other lawful authorities relating to said premises, under the like penalty and damages."

On November 11, 1919, the fire department of the city of New York ordered the landlord to comply with certain requirements of the Labor Law, with respect to the windows opening on the fire escape, and the construction of doors opening thereon. On January 16, 1920, the bureau of buildings of the borough of Manhattan, city of New York, notified the owner of the premises to inclose the elevator shaft to conform to section 374, subdivision 2, of the Building Code, and to comply with rule No. 12 of the elevator rules and regulations adopted by the board of standards and appeals.

On January 21, 1920, the landlord notified the tenants to comply with these orders and that upon their failure to do so, within five days from the date, it would elect to terminate and cancel the leases and would proceed under the statute to recover the possession of the premises. On February 4, 1920, the landlord notified both tenants that it elected to terminate and cancel their leases and required the tenants to immediately vacate and remove from said premises. On March 8, 1920, summary proceedings were instituted and resulted in final orders in favor of the landlord. Upon appeal the Appellate Term reversed the order of the Municipal Court and granted leave to appeal to this court. (112 Misc. Rep. 473.)

In my opinion the landlord could not maintain summary proceedings, which are purely statutory, to recover possession of the demised premises. The failure to perform a covenant to make repairs or to obey all the orders of municipal officers

or departments is not among the grounds for the removal of a tenant specified in section 2231 of the Code of Civil Procedure. Nor in my opinion can the proceeding be sustained under section 94 of the Labor Law (as amd. by Laws of 1915, chap. 653). That section gives the landlord the right to resort to dispossess proceedings in two instances: *First*, if the tenant fails or refuses to permit the owner, his servants or agents to enter and remain upon the demised premises whenever and so long as may be necessary to comply with the provisions of law, the responsibility for which is by this section placed upon the owner; and *second*, "whenever by the terms of a lease any lessee or tenant shall have agreed to comply with or carry out any of such provisions, his failure or refusal so to do shall be a cause for dispossessing said tenant by summary proceedings as aforesaid" (i. e., as provided by the Code of Civil Procedure). The phrase "any of such provisions" refers to the preceding sentence, and means "the provisions of law, the responsibility for which is by this section placed upon the owner." In the covenant in these leases the tenant does not agree to comply with or carry out any of the provisions of the Labor Law. The tenant agrees to carry out *all lawful orders and regulations* of the board of health, police department and city corporation or other lawful authorities. This does not mean a duty imposed by statute law but refers to orders and regulations made by subordinate departments of municipalities or other authorities which exercise regulatory police power.

If the changes in the premises are to be deemed not structural and are otherwise of such a nature as to be within the intent of the parties, so that the tenants violated this covenant by refusing or failing to obey the orders of the bureau of buildings and the fire department, the landlord undoubtedly has the option to terminate the lease. The breach of this covenant, however, is not in the nature of a conditional limitation on the demised term; therefore, the landlord cannot base his claim to resort to these proceedings upon the theory that the lease has expired. (*Kleinstei v. Gonsky*, 134 App. Div. 266.) The law is thus stated in 2 McAdam on Landlord and Tenant (4th ed.), 1563: "If the tenant fails to observe the covenants upon his part contained in the lease * * *

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and if the lease contain a condition that upon default by the tenant in the performance of the covenants and conditions of the lease, the lease shall cease and determine, or be null and void, the estate becomes forfeited upon the breach. The breach, however, does not render the lease absolutely void, but voidable only, at the option of the lessor; and if the landlord desires to insist upon the forfeiture, he must enforce the same by action of ejectment for the possession of the premises."

For these reasons the determination of the Appellate Term should be affirmed, with costs.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Determination affirmed, with costs.

TRACY F. NEWMAN, Appellant, v. "THOMAS" G. R. PIERSON,
the Name "Thomas" Being Fictitious, etc., Respondent.

First Department, February 4, 1921.

Principal and agent — action for damages caused by defendant failing to perform agreement to purchase property from plaintiff's principal whereby plaintiff lost commissions — necessity for alleging that agreed commissions were reasonable value of plaintiff's services — measure of damages.

In an action to recover damages based on the failure of the defendant to perform his agreement with the plaintiff to purchase coal from plaintiff's principal whereby the plaintiff lost his commissions which it was agreed were to be paid by the seller and not by the defendant, it is not necessary for the plaintiff to allege that the agreed commissions were the reasonable value of his services.

The foundation on which the rules for the measure of damages in actions for breach of contract are based is indemnity to the injured party, and in the present case the measure of damages on the refusal of the defendant to purchase the coal would be the commissions the seller had agreed to pay the plaintiff on the sale, if said commissions were reasonable.

APPEAL by the plaintiff, Tracy F. Newman, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New

York on the 23d day of June, 1920, sustaining defendant's demurrer to the complaint.

Chauncey B. Garver of counsel [*Shearman & Sterling*, attorneys], for the appellant.

R. Hunter McQuiston, for the respondent.

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The complaint alleges that the defendant agreed that if the plaintiff would introduce him to someone who was ready, willing and able to sell to the defendant 10,000 to 12,000 tons of bituminous coal for shipment to Genoa, Italy, at the price of \$32.75 per ton, the defendant would purchase from such person 10,000 to 12,000 tons at that price, it being understood that the plaintiff should receive no commission from defendant for bringing about such sale, but should receive his commission from the seller; that plaintiff introduced the defendant to a corporation therein named, which was ready, willing and able to sell to the defendant for shipment to Genoa, Italy, 10,000 to 12,000 tons of bituminous coal at \$32.75 per ton and which agreed to pay plaintiff a commission on such sale of seventy-five cents per ton. The defendant failed and refused to carry out said contract and to purchase said coal although duly requested to do so by the plaintiff and the said corporation, and has thereby prevented the plaintiff from earning his commission, to his damage \$9,000.

The complaint alleges an executory contract, performance by the plaintiff, breach by the defendant, and damages. The insufficiency claimed is the failure to allege that seventy-five cents a ton was the reasonable value of the services rendered. This was not a contract, however, for the performance of services for the defendant where the law would imply an agreement on the part of the defendant to pay the reasonable value thereof, because no price was fixed. The distinct understanding was that the defendant was not to pay for the service. It was understood and agreed that the plaintiff was to find some one who was willing to sell the coal at a stipulated price and who would also pay the plaintiff a commission, the defendant agreeing to purchase the coal from such person. The value of the contract to the plaintiff was the commission which the seller would pay.

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The case of *Amory v. Washington Steamboat Co., Ltd.* (120 App. Div. 818), upon which the court relied at Special Term, is distinguishable from the case under consideration. In the *Amory* case the agreement, as appears from the letters of the parties, was that if the plaintiff was successful in closing a sale of the Washington Steamboat Company's ships and if the company did not close with such purchaser except through the plaintiff, then the plaintiff was to look to the purchaser and not to the company for his commission.

The implied agreement would follow that if the company did close with such purchaser directly or through another agent, then the plaintiff should look to the company for his commission. The defendant closed with plaintiff's customer through another agent at the same price, but on terms more advantageous than those embodied in plaintiff's proposition. The effect of this was that the defendant was liable to pay to the plaintiff, not an agreed amount, for no amount had been agreed upon between them, but a fair and reasonable commission. The court said: "Assuming that this was a failure to comply with the conditions under which the plaintiff agreed to look to the purchasers for his commission, the result of such a violation of the conditions that would follow would be that the plaintiff would be entitled to recover his commission from the defendant, based upon a *quantum meruit*." (p. 821.)

The foundation upon which rules for the measure of damages in actions for breach of contract are based is indemnity to the injured party. "The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent. It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly." (*Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487, 492; *Delafield v. Armsby Co.*, 131 App. Div. 572; *affd.*, 199 N. Y. 518.)

In the present case the defendant knew that the damage

that would be sustained by the plaintiff, if the defendant refused to purchase the coal, would be the commission that the seller had agreed to pay plaintiff on the sale. The amount of the commission was not specified, but that which the seller agreed to pay is presumed to have been reasonable. If the commission which the seller agreed to pay was unreasonable or extravagant, the defendant may set up that defense by answer. (*Booth v. Spuyten Duyvil Rolling Mill Co.*, *supra*, 495.) In my opinion the complaint sufficiently states a cause of action.

The order should be reversed, with ten dollars costs and disbursements, and plaintiff's motion granted, with ten dollars costs, with leave to defendant to withdraw the demurrer and serve an answer within twenty days after service of a copy of the order to be entered hereon with notice of entry, and upon payment of the said costs.

CLARKE, P. J., DOWLING and SMITH, JJ., concur;
GREENBAUM, J., concurs in result.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to defendant to withdraw demurrer and to answer on payment of said costs.

HUYLER'S, Appellant, v. BROADWAY-JOHN STREET CORPORATION, Respondent.

First Department, February 4, 1921.

Summary proceedings — prosecution not enjoined where grounds forming basis for injunction are matters of defense — Municipal Court of New York city has jurisdiction though petitioner alleges present ownership merely — independent action not maintainable for discovery.

A suit for an injunction to restrain the prosecution of summary proceedings in the Municipal Court of the City of New York, on the ground that the notice terminating the lease was ineffectual and that the landlord waived the notice by accepting rent after the expiration of the notice of termination, is not maintainable, since such matters constitute defenses to the proceedings which may be set forth in the answer thereto.

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The fact that the petitioner in the summary proceedings alleged in its petition that "the petitioner is the owner" instead of alleging that "it is and was at all times mentioned herein the owner," did not deprive the court of jurisdiction.

This action will not be permitted in order to obtain discovery on the ground that the petitioner in the summary proceedings could not be examined before trial, since section 1914 of the Code of Civil Procedure prohibits an action for discovery in aid of the prosecution or defense of another action.

APPEAL by the plaintiff, Huyler's, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of December, 1920, denying plaintiff's motion for an injunction *pendente lite* and vacating a restraining order previously granted.

Roger Hinds, for the appellant.

Charles Goldzier of counsel [*Alfred J. Wolff*, attorney], for the respondent.

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The action is for an injunction restraining the defendant from prosecuting a summary proceeding in the Municipal Court to recover possession of the premises known as No. 133 West Forty-second street, upon which is a five-story building which plaintiff as tenant holds under a twenty-one-year lease expiring May 1, 1927.

The lease contained the following cancellation clause in so far as applicable:

"*Fourth.* The party of the second part [lessee] is hereby given leave, within five years from the first day of May, 1906, to tear down the building now on said premises and erect on said premises a new building, subject to the approval by the party of the first part [lessor] in writing, of the plans and specifications therefor; and it is further agreed, that in the event that the party of the second part shall not so erect such new structure within said five years from the first day of May, 1906, then, in that event, the party of the first part shall have the right, after the expiration of said five years, upon giving six months' notice, in writing, and upon payment of the sum of Ten Thousand Dollars (\$10,000), lawful money

of the United States, to the cancellation of this lease, for the purpose of erecting a new building on said premises."

The defendant on October 29, 1919, served upon the plaintiff a notice that it elected to terminate the lease on May 1, 1920, and further stated therein: "We will pay to you the sum of \$10,000 upon your vacation of the premises; or if you prefer, we will let you have the \$10,000 now and have you enter into an agreement cancelling the present lease and terminating your tenancy, on or before May 1st, 1920. If you wish to vacate earlier we will be glad to enter into such an agreement with you, as we intend rebuilding the premises as soon as possession may be had."

The summary proceeding was instituted on November 10, 1920, and the landlord has accepted plaintiff's rent each month since May 1, 1920. When the notice was given the landlord was not the owner of the premises. It had signed a contract to purchase the property and did not take title until December 16, 1919. The plaintiff objects to the defendant being allowed to continue the proceeding in the Municipal Court upon the following grounds: 1. The notice was ineffective to terminate the lease for the reason that the corporation giving the same was not at the time owner of the premises. (*Reeder v. Sayre*, 70 N. Y. 180, 187; *Scheele v. Waldman*, 136 App. Div. 679, 682.) 2. The notice was not effective because the \$10,000 was not paid or tendered at the time of the giving of the notice or prior to the date of its expiration. (*Douglaston Realty Co. v. Hess*, 124 App. Div. 508, 509.) 3. The acceptance of the rent after the expiration of the notice of cancellation was a waiver of the notice, and the tenant, having attorned to the landlord, ceased to be a holdover tenant, and there must be a new notice to terminate the lease. (*Smith v. Littlefield*, 51 N. Y. 539, 543; *Ashton Holding Co., Inc., v. Levitt*, 191 App. Div. 91, 94.)

The facts above set forth may be alleged as defenses to the summary proceeding in the Municipal Court. The New York City Municipal Court Code (Laws of 1915, chap. 279, § 6, subd. 2) provides that the Municipal Court shall have jurisdiction of a summary proceeding authorized by the Code of Civil Procedure to recover the possession of real estate situated wholly or partly within the district. Section

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2244 of the Code of Civil Procedure provides that the answer in such proceeding may set forth a statement of any new matter constituting a legal or equitable defense.

The grounds do not establish a right to injunctive relief. There is nothing in the plaintiff's claim that the Municipal Court does not have jurisdiction, because the petition states that "the petitioner is the owner," instead of alleging that "it is and was at all times mentioned herein the owner." This point was expressly passed upon in *Kaminsky v. Klasko Finance Corporation* (191 App. Div. 412, 415).

Finally, the plaintiff alleges that it is entitled to discovery, and, therefore, the court should permit this action, as the petitioner could not be examined before trial in the summary proceeding. But "an action cannot be maintained, to obtain a discovery under oath, in aid of the prosecution or defence of another action." (Code Civ. Proc. § 1914.)

The motion for an injunction was properly denied, and the order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

GEORGE ROYLE and Others, Respondents, v. GEORGE H. McLAUGHLIN, Appellant.

First Department, February 4, 1921.

Pleadings — when allegations of complaint indefinite and uncertain — action for price of goods sold — failure to allege date of sale as making complaint indefinite and uncertain — relief by bill of particulars not equivalent to order to make definite and certain — purpose of bill of particulars.

On a motion to make a complaint more definite and certain the question is whether one or more of the allegations are so indefinite or uncertain that the precise meaning or application thereof is not apparent.

In an action for the price of goods sold, the failure to allege the date or dates on which the goods were sold makes the allegation indefinite and

uncertain within the meaning of section 546 of the Code of Civil Procedure.

Since it may be that if the date or dates of sale were alleged the Statute of Limitations would apply to one or all the causes of action, a bill of particulars would not furnish the defendant with the information to which he is entitled.

Furthermore, a bill of particulars is seldom granted before answer and its office is to limit evidence and not to supply defects in pleading.

APPEAL by the defendant, George H. McLaughlin, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of December, 1920, denying defendant's motion to make the complaint more definite and certain.

John J. Cunneen, for the appellant.

Henry Abelson of counsel [*Hays, Hershfield & Wolf*, attorneys], for the respondents.

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The complaint after the allegation as to the parties states: "That heretofore the plaintiffs, at the special instance and request of the defendant, sold and delivered to the defendant goods, wares and merchandise of the agreed price and reasonable value of \$8,321.27. * * * That no part thereof has been paid, although payment thereof has been duly demanded, except the defendant is entitled to a credit of \$72.60 for merchandise returned, leaving a balance of \$8,248.67 due, owing and unpaid from the defendant to the plaintiffs." Judgment is demanded for said sum with interest.

It is well settled that this form of a complaint, which is similar to one of the common counts in a declaration of the common-law pleading, satisfies the requirement of section 481 of the Code of Civil Procedure (Code Proc. § 142) that the complaint shall contain: "A plain and concise statement of the facts constituting each cause of action without unnecessary repetition." (*Allen v. Patterson*, 7 N. Y. 476, 478.) Therefore, this complaint would survive a demurrer for insufficiency. That, however, is not the question presented by a motion to make definite and certain under section 546 of the Code of Civil Procedure. On demurrer for insufficiency

the defects must be so substantial in their nature and so fatal in character as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. If the defendant requires a greater degree of certainty than is found in the complaint, he must move that the complaint be made definite and certain. (*Graham v. Camman*, 5 Duer, 697, 699.) On such a motion the question is, are one or more of the allegations contained in the complaint so indefinite or uncertain that the precise meaning or application thereof is not apparent.

In my opinion, the failure to allege a date or dates upon which the goods were sold makes the allegation indefinite and uncertain within the purview of section 546. It does not definitely appear whether this was a contract for sale that was executed by a single delivery, or whether there were several separate and distinct contracts, the aggregate value of which amounted to \$8,321.27. If this should be the case, then each transaction would constitute a separate cause of action, and should be separately stated and numbered (Code Civ. Proc. § 483), and the defendant might have different defenses to the various causes of action. It may be that if the date or dates were alleged, the Statute of Limitations would be a bar that the defendant could plead to the entire cause or to one or more of the causes of action. (*Barrett Mfg. Co. v. Sergeant*, 149 App. Div. 1, 4.) For these reasons a bill of particulars would not furnish the defendant with the information to which he is entitled. Bills of particulars are seldom ordered before answer, and it is their office to limit evidence and not to supply defects in pleading. Before the defendant is required to answer he should be advised certainly of the facts which plaintiffs allege as the cause of action against him.

For these reasons the order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,
concur.

Order reversed, with ten dollars costs and disbursements,
and motion granted, with ten dollars costs.

JOSEPH E. HURWITZ and SIMON SULSKY, Respondents, v. CALVIN REALTY CORPORATION and Others, Defendants, Impleaded with JULIUS J. DUKAS, as Trustee in Bankruptcy etc., Respondent, and SOLOMON LEVIN, Appellant.

First Department, February 4, 1921.

Liens — foreclosure of mechanic's lien — evidence insufficient to support judgment on theory of quantum meruit — plaintiff has same burden in equity and same rules of evidence apply as in action at law.

In an action to foreclose a mechanic's lien wherein the complaint was framed upon a contract and also upon *quantum meruit*, the plaintiffs stating at the trial, however, that they did not rely upon a contract, the evidence was insufficient to support a judgment on the theory of *quantum meruit*, for it did not prove what materials were furnished and the reasonable value thereof, and what labor was performed and its reasonable value. Though the instant case is in equity the plaintiffs must bear the same burden of proving their cause by legal and competent evidence as the plaintiff in any action.

APPEAL by the defendant, Solomon Levin, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 18th day of February, 1920, upon the decision of the court rendered after a trial at the New York Special Term in an action to foreclose a mechanic's lien.

Meyer Levy, for the appellant.

Gerson C. Young, for the plaintiffs, respondents.

Louis B. Boudin, for the respondent Julius J. Dukas, as trustee, etc.

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The plaintiffs were subcontractors of the defendant Levin who had a contract for restoration of a building partly destroyed by fire. The plaintiffs' notice of lien makes no mention of the contract, but states that the name of the person by whom the lienors were employed and to whom they furnished

materials is Solomon Levin; that the labor performed was carpentry, glazing and hanging hardware; the material furnished was hardware, lumber, trim, sash, doors and glass; that the agreed price and value of such labor and materials is \$3,861.25 and the amount unpaid is \$2,062.03. We consider it doubtful whether this notice complied with the requirements of the Lien Law. (See § 9, as amd. by Laws of 1916, chap. 507.) There is, however, a more substantial defect in the plaintiffs' case.

The complaint in the action was framed upon a contract and also upon a *quantum meruit*, the plaintiffs stating at the trial that they did not claim under the contract. The evidence was entirely insufficient to support a judgment on that theory. It was necessary for the plaintiffs to prove what materials were furnished and the reasonable value thereof, what labor was performed and its reasonable value. One of the plaintiffs was allowed to testify, reading from the bill of particulars, which he had no part in preparing, and which was not made up of any book entries or memoranda he had prepared or ever seen, upon the theory that he was refreshing his recollection. The language of the bill of particulars was very general, and the testimony of the witness merely added to this general language "We furnished" or "furnished and erected" or "installed." No testimony was given as to the details of any of the material or the value thereof or of the amount of labor. This evidence was accepted as proof of the performance of the contract for which the contract price was \$2,300. Some deduction was made for certain things that the plaintiffs admitted they had failed to furnish which were called for by the contract. As to the extra labor performed and the materials furnished, the other plaintiff, who gave the information to the attorney to enable him to prepare the bill of particulars, was allowed to testify from the bill of particulars in the same general manner. He, however, gave his estimate as to the amount of materials and the amount of labor that must have been furnished or employed, which gave a total of about \$1,500. Not a book was produced nor was any proof offered as to the actual amount of materials furnished or the actual amount of labor performed.

The plaintiffs failed to prove any cause of action upon a *quantum meruit*. They admit that they did not perform the contract; in fact in their reply they state "that all of the provisions of said agreement were disregarded in respect to the work and material set forth in the complaint." The plaintiffs' attorney realizing that tested by the rules of evidence he had failed to establish a case, claims in his brief that such rules are not to be invoked "in an action in equity triable before the court without a jury, where very frequently a good deal of testimony is permitted merely for the purpose of aiding the conscience of the court and enabling it to come to a just decision," while he states that he does not admit that incompetent testimony was allowed, but "that if any of the testimony was not strictly in exact accord with the strict rules of evidence, such testimony did not in any way prejudice the rights of the appellant."

Plaintiffs in a court of equity must bear the same burden of proving their cause of action by legal and competent evidence as the plaintiff in any action; and in this case they failed to establish their cause of action either upon a *quantum meruit* or upon contract. The motion made at the close of the plaintiffs' case should have been granted. The findings of the court in so far as they relate to the plaintiffs' lien and the portion of the judgment entered thereon should be reversed, with costs to the appellant, and the complaint dismissed, with costs to the defendant Solomon Levin.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

The portion of the judgment relating to plaintiffs' lien reversed, with costs, and the complaint dismissed, with costs to the defendant Solomon Levin. Settle order on notice.

**JAMES P. BROWNE, Appellant, v. PRUDDEN-WINSLOW
COMPANY, Respondent.**

First Department, February 4, 1921.

Libel — privileged communication — letter by defendant to its customers stating reason for discharging plaintiff qualifiedly privileged — proof of actual malice necessary — “dishonest” as used in communication means unfaithfulness.

Where an employee has been discharged or has severed his connection with his employer, the employer has the right to notify his customers of the cessation of the employment and to state his reasons therefor. Such communication is qualifiedly privileged and so long as the employer has reason to believe that the statements in his communication are true and the language used is not so intemperate and malevolent as to show a malicious intent to injure the employee, the employer cannot be held liable in damages, even though the statements in the communication were false, unless the plaintiff by extrinsic evidence proves actual malice.

The complaint was properly dismissed for it was proven by plaintiff's own testimony that the defendant had reasonable grounds for believing the statements made in the communication constituting the alleged libel, that the plaintiff had been disloyal to the defendant's interests by endeavoring to injure its business in relation to certain of its customers, and that he had been repeatedly and willfully dishonest in these transactions with the defendant.

The word “dishonest” as used in the communication did not refer to money matters, but unfaithfulness to the defendant and abuse of the relation of employer and employee by attempting to divert business from the employer to a rival while being paid by the employer; such conduct would be willful dishonesty in his transactions with the employer.

APPEAL by the plaintiff, James P. Browne, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 14th day of June, 1920, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case, and also from an order entered in said clerk's office on the 8th day of June, 1920, denying plaintiff's motion for a reargument of the motion to dismiss the complaint and to set aside the direction dismissing the same and to grant a new trial upon the exceptions taken by the plaintiff at the trial.

Jacob H. Corn of counsel [*Siegel & Corn*, attorneys], for the appellant.

Franklin F. Russell of counsel [*Isidor Beaudrias* with him on the brief], for the respondent.

PAGE, J.:

This is an action to recover damages for libel. The plaintiff was employed by the defendant as a traveling salesman having a certain specified territory. He was paid a salary and an allowance for traveling expenses. The complaint alleges the publication of the following libel, which by stipulation of the parties is conceded to have been mailed in due course to about 150 persons and firms in various lines of business related to the line of business of the defendant, all of whom were customers of the defendant and whose places of business were within the territory of the plaintiff:

“ANNOUNCEMENT — Reference: James P. Browne.

“We wish to advise you that after March 3, 1917, James P. Browne will not be connected, in any way, with us, nor authorized to represent us in any way whatsoever. We have only recently received conclusive evidence that Mr. Browne has, while in our employ and accepting salary from us, been disloyal to our interests, by endeavoring to injure our business and our relations with certain of our customers. In addition to such disloyalty, he has been repeatedly and wilfully dishonest in his transactions with us. Accordingly, we feel that as Mr. Browne may have attempted to injure us in your estimation, we should advise you of the above facts and warn you that he has been discharged from our employment for cause. Regretting the necessity for prompting the sending of this letter and trusting that no dissatisfaction, which may have been occasioned on account of his previous connection with this Company, may affect unfavorably our future business relations with you, we beg to remain.

“Yours very truly,

“PRUDDEN-WINSLOW COMPANY.”

The answer pleads justification and privileged communication. The only witness examined was the plaintiff, who

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testified that he was sent to get information concerning the letting of a contract for sewers in Lyndhurst, N. J.; that he found out who was the lowest bidder and discovered that the person who had bid would assign his bid to one O'Neill, who was a tax commissioner; that he interviewed O'Neill and was referred by O'Neill to the firm of W. H. Wurdemann & Co. of Lyndhurst, a local dealer in sewer pipes, through whom O'Neill said that he would clear the transaction. The plaintiff reported to Mr. Winslow, the defendant's president, and Mr. Winslow took up the negotiation with Wurdemann & Co. and secured a tentative agreement that if the contract was signed and Wurdemann received the order through O'Neill, he would fill it with the defendant's sewer pipe. Mr. Winslow directed the plaintiff not to see any of the parties in regard to this contract and specifically not to see Mr. Wurdemann, informing plaintiff that he had the matter in charge. Plaintiff testified that notwithstanding this order he called a number of times on O'Neill, Wurdemann and a man by the name of McDermott, who was in some way, not disclosed by the evidence, interested in the contract, and that shortly before the first of March he introduced to Wurdemann a Mr. Hoover, who was a traveling salesman for the American Sewer Pipe Company, a competitor of the defendant, and admitted that Hoover desired to see Mr. Wurdemann in reference to the contract that was the subject of negotiation between Winslow and Wurdemann. Plaintiff also admitted that he had informed O'Neill, Wurdemann and McDermott that the defendant had treated him unfairly, and that he intended to sever his connection with the defendant. On March third the plaintiff demanded his weekly pay, and Mr. Winslow refused to pay him. Thereupon the plaintiff gave two weeks' written notice of a cancellation of his contract of employment. Mr. Winslow thereupon immediately ordered him out of the office, and the circular which is the subject of this action was then sent out to the customers of the defendant. The court at the conclusion of the plaintiff's case dismissed the complaint, holding as a matter of law that the communication was privileged and that the plaintiff had failed to prove malice in its publication. In my opinion the learned trial justice was entirely right. It is well settled that where an employee

has been discharged or severed his connection with the employer, the employer has the right to notify his customers of the cessation of employment and to state his reasons therefor. In such a case the communication is qualifiedly privileged; that is, so long as the employer has reason to believe that the statements contained in his communication are true and the language used is not so intemperate and malevolent as to show a malicious intent to injure the employee, the employer cannot be held liable in damages, even though as a matter of fact the statements in the communication were false, unless the plaintiff by extrinsic evidence proves actual malice. (*Klinck v. Colby*, 46 N. Y. 427, 431; *McCarty v. Lambley*, 20 App. Div. 264, 267.) In the case under consideration, not alone did the plaintiff prove by his own testimony that the defendant had reasonable grounds to believe the statements made in the communication, that the plaintiff had been disloyal to its interests by endeavoring to injure its business in relation to certain of its customers, but that he had been repeatedly and willfully dishonest in these transactions with the defendant.

The plaintiff's counsel lays great stress upon the charge of dishonesty, claiming that it was intended thereby to charge that the plaintiff had been guilty of embezzlement and larceny. Taken in the context in which the word was used, it would not bear that construction. Unfaithfulness to his employer and abuse of the relation of employer and employee by attempting to divert business from the employer to a rival while being paid by the employer would be willful dishonesty in his transactions with the employer, and it was in this sense that the word was used.

The judgment should be affirmed, with costs.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,
concur.

Judgment affirmed, with costs.

STEPHEN J. ZECCHINI, Respondent, v. FRANCIS R. MAYER
and CHARLES MAYER, Appellants, Impleaded with CHESTER
THOMPSON, Defendant.

First Department, February 4, 1921.

Pleadings — purpose of bill of particulars and of examination before trial — right to have bill of particulars served before examination of defendant before trial — inability of plaintiff to state definitely particulars required.

The office of a bill of particulars is to limit the issues under the pleadings.

The examination before trial is for the purpose of adducing evidence to be used upon the trial of the issues, except in those cases where it is expressly granted to enable the plaintiff to frame a pleading or to obtain information necessary to enable him to give a bill of particulars.

In an action to recover for services rendered in introducing the defendants to prospective customers, in which the plaintiff secured an order for the examination of one of the defendants before trial concerning the agreement, the names and addresses of the various business houses, officials and agents to whom the plaintiff introduced the defendants and as to the amount of the business which the defendants did with them, the defendant was entitled to have served, before the examination, a bill of particulars covering execution of the alleged agreement, the circumstances of the alleged introductions and the names and addresses of the people with whom the defendants did the alleged business, for the examination was to procure evidence of the defendant to be used on the trial and until the bill of particulars was served the relevancy and materiality of the evidence to the issues could not be determined.

If the plaintiff is unable to state definitely the particulars required as to the people with whom the defendants did business he may make the best statement possible and state his reasons for not giving greater detail.

APPEAL by the defendants, Francis R. Mayer and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of December, 1920, granting plaintiff's motion to open his default in serving a bill of particulars.

Carroll G. Walter of counsel [*Patterson, Eagle, Greenough & Day*, attorneys], for the appellants.

Louis Boehm, for the respondent.

PAGE, J.:

The plaintiff sues to recover \$450,000 for services rendered in introducing the defendants to various business firms and to various officials and agents of the French government with whom he claims the defendants subsequently did business for which they received \$30,000,000.

On June 1, 1920, the plaintiff secured an order for the examination of the defendants Mayer before trial with respect to the following matters:

1. The alleged agreement set forth in the complaint; 2. The names and addresses of the various business houses, officials and agents of the French government to whom the plaintiff introduced the defendants; 3. The amount of business the defendants did and the amount of net profits realized by them as a result of such introduction.

Thereafter, and on July 6, 1920, the defendants moved to vacate or modify the order for the examination before trial and also moved for a bill of particulars of the plaintiff's complaint, setting forth in detail:

"(1) The date when, the place where, and persons through or by whom plaintiff claims defendants entered into the alleged agreement.

"(2) Whether the agreement was oral or in writing.

"(3) The full names and addresses of the various business houses and various officials and agents of the French Government to which and to whom the plaintiff claims he introduced the defendants and the dates when and the places where he claims such introductions were made.

"(4) The names and addresses of the business houses and the officials and agents of the French Government with which the plaintiff claims the defendants did business for which they received the sum of \$30,000,000, as alleged in paragraph V of the complaint."

On July 9, 1920, the motion to vacate the order for examination was denied and the motion requiring the plaintiff to serve a bill of particulars was granted as to items 1 and 2. On appeal to this court the first order was affirmed and the second modified by including items 3 and 4. (193 App. Div. 950.) The order as modified was served on October 30, 1920, hence the time to serve the bill of particulars expired on

November 9, 1920. The order affirming the order for the examination was entered on November sixth, and the date for the examination was set for November 12, 1920. The plaintiff failed to comply with the order requiring him to serve a bill of particulars, and defendants made a motion to preclude testimony, which was granted without prejudice to a motion by plaintiff to open his default. The order also restrained the plaintiff from proceeding with the examination. The plaintiff thereupon moved to open his default in serving the bill of particulars. The motion was granted on the payment of ten dollars costs, and the time to serve the bill of particulars was extended thirty days from December 6, 1920, the order restraining the plaintiff from proceeding with the examination was vacated, and the examination directed to proceed on December 20, 1920.

The office of a bill of particulars is to limit the issue under the pleadings. The examination before trial is for the purpose of adducing evidence to be used upon the trial of the issues, except in those cases where it is specifically granted to enable the plaintiff to frame a pleading or to obtain information necessary to enable him to give a bill of particulars. The order for examination of the defendants herein was obtained after answer and before a bill of particulars had been ordered. Obviously, therefore, it was to procure the evidence of the defendants for use upon the trial. Until the bill of particulars has been served, the relevancy or materiality of the evidence to the issues cannot be determined.

The plaintiff certainly knows the date when and the place where and the persons through or by whom he claims the agreement sued upon was made, whether it was oral or in writing, and the names and addresses of the persons to whom he claims he introduced the defendants. If he is unable to state definitely the particulars required in the 4th item, he can make the best statement possible and state his reasons for not giving greater detail. It is evident that some of the details are known to the defendants and not to the plaintiff and will be the proper subject of the examination.

The order will, therefore, be modified, by fixing the time for the defendants Mayer's examination ten days after the bill of particulars shall have been served, and as so modified

affirmed, with ten dollars costs and disbursements to the appellants; the bill of particulars to be served thirty days after service of the order to be entered hereon, pursuant to stipulation of the parties.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ., concur.

Order modified as directed in opinion, and as so modified affirmed, with ten dollars costs and disbursements. Settle order on notice. Motion for stay granted.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK CENTRAL RAILROAD COMPANY, Relator, v. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, SECOND DISTRICT, and CHARLES B. HILL and Others, as Public Service Commissioners of the State of New York, Being Members of Said Commission, Second District, Respondents.

Third Department, February 28, 1921.

Railroads — jurisdiction of Public Service Commission to compel reconstruction of switch between railroads — Federal Transportation Act of 1920 not applicable — necessity and convenience — findings of Commission will not be disturbed.

The Public Service Commission, by virtue of section 35 of the Public Service Commissions Law, as amended by chapter 637 of the Laws of 1920, had jurisdiction of proceedings to compel the New York Central Railroad Company and the Lehigh Valley Railroad Company to reconstruct a switch connecting their lines at Batavia; the Federal Transportation Act of 1920 does not apply.

The evidence fully establishes the necessity and convenience for the reconstruction of said switch.

The findings of the Public Service Commission will not be disturbed except where said findings, if made by a jury, would be set aside as against the weight of the evidence.

CERTIORARI issued out of the Supreme Court and attested November 22, 1920, directed to the Public Service Commission of the State of New York, Second District, and others, commanding them to certify and return to the office of the clerk of the county of Albany all and singular their proceedings

had in directing the New York Central Railroad Company and the Lehigh Valley Railroad Company to complete a switch between the two railroads in the city of Batavia.

Locke, Babcock, Spratt & Hollister [*Maurice C. Spratt* of counsel], for the relator.

Ledyard P. Hale of counsel, for the respondent.

KILEY, J.:

Batavia is a city of about 14,000 inhabitants situate in Genesee county. The Erie railroad and the New York Central railroad, with its Canandaigua branch, run east and west through the northern part of the city, and the Lehigh Valley railroad runs east and west-south through the southern part of the city and about one mile from the center of said city. The New York Central and its Canandaigua branch and the Erie Railroad Company have switching facilities at Batavia, by which interchange between the tracks of these roads is made. The New York Central railroad is south of the Erie railroad. In 1891 the Lehigh Valley railroad connected with the Central at Batavia by means of a curved switch of about one-half mile in length, through said city at a point where most of the industrial plants in said city are situate. In 1895 or 1896 this switch, for about 100 feet south of the Central, and the nearest end to the Central, was abandoned, and the rails for that length taken up; the reason given in the record is that the Lehigh Valley Railroad Company had acquired other connections or facilities at Depew Junction or the Tonawandas. There is now a private switch between the two systems in the city of Batavia, but can only be used by permission of the private owner; it runs close to the plant of the party owning it and complaint is made of the inconvenience and hazard created by reason thereof. Geneva lies about sixty-five miles east of Batavia, and Buffalo or Gardenville lies about thirty-five miles west of Batavia. The New York Central and Lehigh Valley parallel each other between those two points. In June, 1920, the complaint or petition of the Batavia Chamber of Commerce, Inc., of Batavia was filed with the Public Service Commission, Second District, for an order requiring the Lehigh Valley Railroad Company

and the New York Central Railroad Company to reconstruct and put in operation the portion of said switch so abandoned as aforesaid; the basis for the complaint was the inconvenience caused the business interests of said city by the absence of said switch, and the inconvenience that would be had to said business interests by its reconstruction. The answer of the Lehigh Valley Railroad Company denies that it had violated any section of the Public Service Commissions Law, and that the Public Service Commission did not have jurisdiction to make the order prayed for. The New York Central answered to the same effect, alleging that sole jurisdiction of the subject-matter was conferred upon the Interstate Commerce Commission by the Transportation Act of 1920; and denied the convenience and practical value of the reconstruction of that end of the switch. Hearings were had before the Commission, and on or about October 5, 1920, an order was made directing the relief asked for by the Batavia Chamber of Commerce. The New York Central Railroad Company procured a writ to review the proceedings had before the Public Service Commission in this court. The Batavia Chamber of Commerce aforesaid in January, 1919, instituted similar proceedings. It was held in those proceedings that the Public Service Commission did not have jurisdiction to grant the relief asked for. After the termination of the last-mentioned proceedings and before the commencement of these proceedings the Public Service Commissions Law, section 35, was amended (Laws of 1920, chap. 637, effectual May 10, 1920) authorizing the Public Service Commission to take jurisdiction of situations such as the one under consideration here. As to the Transportation Act of 1920, subdivisions 18 to 21, inclusive, of section 1 of the Interstate Commerce Act (24 U. S. Stat. at Large, 379), as amended by section 402 of the Transportation Act of 1920 (41 id. 477, 478), give the Interstate Commerce Commission control over the extension of a line of railroad, the construction of a new line of railroad, and the operation of the extension or new line; that means, of course, when their operation, in whole or in part, is interstate. But subdivision 22 of said section 1, as amended by said section 402 of the Transportation Act of 1920, provides that such authority, so conferred, subdivisions 18 to 21, inclusive, "shall

not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State," etc. The abandonment made here was of a switch or a portion of a switch, and the reconstruction sought here is of a switch or a portion of a switch. The Public Service Commission, Second District, of this State had jurisdiction to make the order. As to necessity and convenience, the record is replete with evidence of inconvenience, because of the absence of that switch. There are sections of the country that can be served through the Lehigh Valley much more conveniently and expeditiously than by the New York Central or the Erie. The Lehigh Valley can make connections in New York city that cannot be made over the New York Central. The Lehigh Valley has a through billing arrangement over the Grand Trunk into Canada that is more convenient than either of the other roads. If a car comes over the Lehigh Valley that should have come over the Central, or *vice versa*, it has to be returned to Buffalo or Geneva to get it back to the right station in Batavia, unless it is hauled by truck or wagon, or put over this private switch. The relator says there are not many such instances; the record discloses a good many; why should there be any? Something was said upon the argument about danger attendant on the operation of this switch. There is a switch and switching going on continuously now between the main line Central, the Canandaigua branch, and the Erie, and over this private switch. The expense is another item urged why this order should be set aside. The Central should not be permitted to tie a community hand and foot because of any item of expense of the amount honestly involved here. The Lehigh Valley is not here complaining. The basis of the Central's opposition is obvious. We cannot disturb the finding of this Commission unless it would be set aside by a court, after a trial by jury in an action triable by a jury, as against the weight of evidence. (Code Civ. Proc. § 2140.)

The finding is amply supported by the evidence, and the order should be affirmed, with costs.

Determination unanimously confirmed, with fifty dollars costs and disbursements.

MAUDE H. C. DAVIS, Respondent, v. WILLIAM H. DAVIS,
Appellant.

Third Department, February 28, 1921.

Husband and wife — action for separation — right to temporary alimony and counsel fees where valid separation agreement in existence.

Counsel fees and alimony *pendente lite* should not be granted in an action for separation where it is necessary for the plaintiff to set aside a prior separation agreement before legal separation can be asked; the question of the validity of the separation agreement cannot be tried on affidavits.

APPEAL by the defendant, William H. Davis, from an order of the Supreme Court, made at the Madison Trial and Special Term and entered in the office of the clerk of the county of Madison on the 11th day of May, 1920, allowing plaintiff \$150 counsel fee and \$30 a month alimony during the pendency of the action.

Brown & Woolver [Edwin J. Brown of counsel], for the appellant.

George B. Russell, for the respondent.

KILEY, J.:

Previous to the 6th day of August, 1903, the plaintiff in this action brought an action in the Supreme Court for separation from the defendant; the defendant answered in that action demanding affirmative relief against the plaintiff. While such action was at issue and before trial the parties reached an adjustment on terms which were incorporated in a written agreement of separation entered into between the parties hereto and a third party. That agreement is set forth in the complaint in this action and is before us upon this appeal. Among the provisions pertinent here are the following: "That they [husband and wife, parties to that action and parties to this action] *have been living separately for the year last past.*" "The said William H. Davis hereby agrees that he will pay at the time of the execution of this agreement to his said wife

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[the plaintiff in the former action and in this action] the sum of \$1,250.00, which shall be and is hereby mutually agreed to be in full for the support and maintenance of his said wife and child, * * * which said sum the said Maude H. C. Davis does hereby agree to accept and take in full satisfaction of her support and maintenance and alimony and costs of said action." "And the said Maude H. C. Davis, in consideration of the payment and covenants aforesaid, does hereby agree that she will live separate from the first party and will not make demands, claims or institute any action or special proceeding of any nature with the purpose of charging or collecting from her said husband, for her support and maintenance, or necessities of life, and will not interfere or disturb him in any manner whatsoever." The parties lived separate and apart under this contract for about seventeen years; defendant paid his money and performed under its terms. No claim to the contrary was made until April, 1920, when plaintiff brought this action. It is apparent that plaintiff was advised and realized that, so far as getting any more money from the defendant through the instrumentality of a judgment, she would have to get rid of that agreement made in 1903. She seeks to do that upon three grounds which are set up in the complaint: *First*. That the contract was made while plaintiff and defendant were living together as man and wife; that it provided for their separation, and was, therefore, against public policy. *Second*. That at the time of the execution, acknowledgment and delivery of the separation agreement, and the payment to and acceptance of the money by her, she was incompetent to understand the nature and effect of the act. *Third*. That it was procured by fraud and duress. Defendant's answer controverts each material allegation of the complaint and puts them in issue. Plaintiff made a motion for alimony and counsel fee, and by an order of the Supreme Court at Trial Term was allowed \$30 a month alimony and \$150 counsel fee. Defendant took this appeal, and urges that the contract of 1903, above referred to, saves him harmless until it is set aside; that the questions of fact created by the pleadings cannot be tried and determined upon affidavits. He is right. The contract set out by the plaintiff in her complaint is a legal contract and stands until set aside.

The separation part of the action does not come in until the setting aside of the contract is an accomplished fact. The court was in error in allowing counsel fee or alimony. A similar situation was under consideration in *Greenfield v. Greenfield* (161 App. Div. 573). Should the plaintiff succeed in her action, upon which we express no opinion, then the amount she shall receive, if anything, will properly be a subject for consideration by the trial court. This agreement, if made after separation, was valid. (*Winter v. Winter*, 191 N. Y. 462.) By its terms plaintiff agreed it stated the true facts at the time. Evidence tending to show that it does not state the true facts must be given by witness under oath in court and subject to cross-examination, and cannot be considered when presented by affidavits.

The order appealed from should be reversed, but without costs.

All concur.

Order reversed, without costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of EDWARD NIDDS, Respondent, for Compensation under the Workmen's Compensation Law, v. STERLING CEILING AND LATHING COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law—continuance of disability—burden of proof.

The burden of proof was on the claimant to show that his disability continued, and he did not sustain the burden of proof, but on the contrary the evidence is against his contention that he is still incapacitated.

APPEAL by the defendants, Sterling Ceiling and Lathing Company and another, from an award and decision of the State Industrial Commission, entered in the office of said Commission on the 26th day of September, 1919, and also from

the award and decision, as modified, entered in the office of said Commission on the 8th day of June, 1920.

James B. Henney [*William H. Foster* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, and *Bernard L. Shientag* of counsel], for the respondents.

KILEY, J.:

On June 18, 1917, claimant was injured while at work for the employer in Brooklyn, N. Y. He was a metal lather; his average daily wage was \$6. He was walking along a partition wall in the building, slightly higher than his head, when a couple of the tile became detached and fell onto his head. This is taken from his first claim for compensation and is dated June 19, 1917. On December 20, 1917, he filed a second claim in which he says his scalp was lacerated. The attending physician, under date of April 25, 1919, made a report to the same effect making the wound two and one-half inches. Before the last report of the physician last referred to claimant settled his claim for injury with the third party, the general contractor, without reference to the compensation, for \$250, went back to work, earned from the employer here concerned \$392; from a second employer he received for work performed \$499.41, and from a third \$541. As near as I can figure it out from this record these amounts were earned before he filed his last claim. When he settled for the \$250 he did not pay his physician, and was not likely to, and the claim aforesaid was the result of that oversight. I think this is a fair inference from the evidence. His average weekly wage was \$34.62. On December 17, 1919, the Commission made him an award for sixty-six and two-thirds per cent of that amount from July 3, 1917, to October 6, 1919, less what he had earned and what he had been theretofore paid, the balance at that time being \$422.60, and continued the case. On June 8, 1920, the Commission deducted the \$250 paid on settlement and found he had been overpaid. This last award did not contain any order of continuance. This claimant has been

repeatedly urged to go to work; he will not do so. No physician but the one apparently interested in getting his own compensation can find any reason why this man does not go to work; that he is a malingerer seems clear beyond peradventure. The burden of proving that his present incapacity to work is on him and he has not met that burden. (*Chimora v. International Ice Cream Co.*, 193 App. Div. 538.) The weight of the evidence and all evidence worthy of the name is against claimant's contention.

The award should be reversed and claim dismissed.

All concur.

Award reversed and claim dismissed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of DELIA NESTOR, Respondent, for Compensation under the Workmen's Compensation Law, on Behalf of Herself and Infant Son, on Account of the Death of Her Husband, ANDREW NESTOR, v. PABST BREWING COMPANY, Employer, and STANDARD ACCIDENT INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law — death from heart disease following injury — evidence not establishing causal relation between accident and heart disease.

Where on an appeal from an award for death from heart disease following an injury, the case is sent back for a further hearing on the ground that the presumption arising from the death certificate stating that death was caused by heart disease was overcome by positive evidence that there was no causal relation between the accident and the immediate cause of death, an award is not justified on a rehearing where the only additional evidence that the injury contributed to the death was the opinion of an expert based on the facts disclosed by the record, eliminating the death certificate.

JOHN M. KELLOGG, P. J., dissents.

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Third Department, February, 1921.

APPEAL by the defendants, Pabst Brewing Company and another, from a decision and award of the State Industrial Commission, made on or about the 7th day of April, 1920.

Neile F. Towner, for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, and *Bernard L. Shientag* of counsel], for the respondents.

KILEY, J.:

Claimant's intestate worked for the employer above named for the five years previous to June 1, 1918. He was a stableman and night watchman, lived over the stables with his family, consisting of these claimants. On said first day of June he was leading three horses down the runway in said stable, in New York city, and one of them became unmanageable. Nestor was thrown down and trampled upon by the horses and severely injured. He had to immediately quit work and was sent to a hospital, his dislocated shoulder set, and other numerous bruises and contusions examined. He returned and the company doctor gave him some attention, not much, and ceased attendance July 5, 1918, discharging him as cured. He died July 21, 1918, of heart disease. The employer and employee agreed on compensation, which was approved by the Commission, and paid until the day before he died. On subsequent hearing at which only the attending physician was sworn, and whose evidence was to the effect that there was no causal relation between the accident and the heart disease from which he died, I mean only medical testimony, other evidence was given, viz., death certificate with a disclaimer, and lay witnesses testified, an award was made in favor of the claimants. On appeal this court reversed the award with but one dissent. (191 App. Div. 312.) We there held "there is absolutely no evidence that the deceased had a heart lesion at the time of the accident. There is no evidence that the cause of death was heart disease unless it be the death certificate." The doctor testified that on two examinations no heart difficulty was found, and we, therefore, held that any presumption arising from the introduction of the death certificate in evidence dis-

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appeared "in the presence of substantial evidence to the contrary. (*Rose v. Balfe*, 223 N. Y. 486; *Potts v. Pardee*, 220 id. 431; *Fallon v. Swackhamer*, 226 id. 447.)" The case went back for a further hearing. The additional evidence introduced was that of an expert who was asked to give an opinion upon the main question, causal relation, basing his opinion upon the facts disclosed by the record, eliminating the death certificate. His opinion was to the effect that the injury was a contributing cause. No new evidential fact was offered, and I do not think the case differs or is strengthened by the additions made since the last appeal. The Commission affirmed its previous award. Mr. Shientag's brief is an able argument for sustaining the award, but it cannot supply the lack of evidence. I think we are bound by our previous decision in this case and that the award should be reversed and the claim dismissed.

All concur, except JOHN M. KELLOGG, P. J., dissenting.

Award reversed and claim dismissed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of Mrs. MARY McGOEY, Respondent, for Compensation under the Workmen's Compensation Law, on Account of the Death of Her Husband, BRYAN McGOEY, Deceased, v. TURIN GARAGE AND SUPPLY COMPANY, Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law — death from pulmonary tuberculosis following injury — evidence establishing causal relation between injury and disease — when Appellate Division will not interfere with finding of State Industrial Commission — presumptions under section 21.

Claimant's testator, a car washer, at the time he was injured by being crushed between two automobiles, apparently was in good health, but shortly thereafter he developed pulmonary tuberculosis from which he

died within a year from the date of the injury. *Held*, that the evidence is of such probative force that the finding of the State Industrial Commission that there was a causal relation between the injury and the disease should not be disturbed.

Under the evidence section 21 of the Workmen's Compensation Law relating to presumptions was applicable.

APPEAL by the defendants, Turin Garage and Supply Company and another, from an award and order of the State Industrial Commission, entered in the New York office of said Commission on the 30th day of April, 1920.

Philip J. O'Brien [John Vernou Bowvier, Jr., of counsel], for the appellants.

Charles D. Newton, Attorney-General [E. C. Aiken, Deputy Attorney-General, Bernard L. Shientag and Jeremiah F. Connor of counsel], for the respondents.

KILEY, J.:

Claimant's intestate worked for his employer, appellant herein, as a car washer. On May 24, 1919, while so engaged he met with an accident by being crushed between two cars in the garage in which he was working. The record shows that the injury was severe enough so that his foreman sent him home as unfit for service on account of the injuries he received. A doctor was called and he was kept in bed for about a week, and idle until June seventh or eleventh, when he went back to work. He swears he was not feeling well any of the time after the accident. He continued to work for about two weeks, when he could no longer perform his duties, and we next, and comparatively soon, find him in the hospital suffering from tuberculosis; he lingered and grew worse for eight or nine months after the date of the accident and finally died February 1, 1920. The finding of the Commission is to the effect that the employee had dormant pulmonary tuberculosis at the time of the accident, and that the injuries aggravated and activated the disease, so that from dormant it became progressive and by progression reached its advanced and final stage, resulting in and causing death. The appellant insurance carrier argues that there is no evidence of causal relation between the injury and the disease. The Commission has determined, as a matter of fact, that there was such relation, and if there is evidence of

probative force, even meager though it be, we cannot disturb the finding. (Workmen's Compensation Law, § 20, as amd. by Laws of 1919, chap. 629.) To determine whether or not there was "a residuum of legal evidence" to sustain the finding of the Commission, resort must be had to what the evidence discloses first as to facts and then as to probabilities. That the Commission had a healthy subject, forty-one years of age, immediately prior to May 24, 1919, the date of accident, appears beyond question from the evidence. That he was injured in the manner he claimed is not contradicted, except by inference, so that the first question is the extent of the injury. The evidence is not so clear as to the extent of the initial injury as might be desired. Just what occasioned the injury we have only in outline; however, practical common sense with some knowledge of cars, their conformation and construction, will fill in the outlines. The claimant's intestate says he was crushed between two cars; that the contact with his body was at the groin region, the abdomen, and chest or ribs. One of the cars had two tires on rims fastened to the running board near the forward door or about where the door would open if the tires were not there; the injured man was caught first at the mud guard in front, forced toward the rear by the other car which must have struck him diagonally; his body followed the conformation of the mud guard, which pressed against his body higher up as he was forced along the mud guard, which finally had described a half circle on the body; his body then came in contact with the stationary tires which made a contact still higher up on the body and was easily against the chest wall or back if he was rolled in the process. As he reached this point relief came, it is not clear how, and he sat on the running board, where his foreman found him injured. The record is very large for this kind of a case, due to medical expert testimony produced upon the one issue, viz., the causal relation between the injury and cause of death. It appears beyond doubt that death was caused by tuberculosis, and the bone of contention is, did the injury contribute to, accelerate, activate and give velocity to the progress of the disease? If there is any evidence to sustain the affirmative of this proposition, it will be held to be covered by the contract of insurance and appellant cannot escape liability. (*McCahill v. N. Y.*

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Transportation Co., 201 N. Y. 221.) No matter where the force of the contact was heaviest, either front or rear, if it injured the pelvic cavity so as to set up area inflammation, that inflammation would transmit itself to any weak or weakened organ of the body without much delay. The evidence of the physicians is not satisfactory, and except one, is of a negative goodness. They say it might contribute; none of them explain how this condition came about so soon after the injury, if the injury did not contribute to the condition. There was a sharp conflict between the physicians who had seen the injured man after the injury, in that some evidence was positive as to the absence of a contributing cause, and that which maintained that the injury was or might be a contributing cause. To aid the Commission it called or had called its expert who not only examined all of the evidence but submitted to a severe and extended cross-examination. His opinion was in favor of claimant; that the injury was an activating agency, and contributed to, or quickened, the progress of the otherwise dormant tubercular condition. One of the physicians testified that "any injury received by a man or woman having a tubercular lesion may actuate or may aggravate the condition and may show with such a lesion existing which might not have been revealed for many months or for many years." I think under the evidence the case reached a position before the Commission where section 21 of the Workmen's Compensation Law was applicable. It seems that we have sustained awards on evidence no more potent than the evidence appearing here. Subdivision 7 of section 3 of the Workmen's Compensation Law (as amd. by Laws of 1917, chap. 705) defines "injury" and "personal injury" to mean "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." The evidence may be held to show that the diseased condition naturally followed the injury and resulted therefrom. (*Schlenker v. Garford Motor Truck Co., Inc.*, 183 App. Div. 166; *Matter of Rist v. Larkin & Sangster*, 171 id. 71; *Van Gordon v. Hires Condensed Milk Co.*, 193 id. 601.) The form of the award is criticised; it is claimed to be in the alternative and that it seeks to incorporate the opinion of a Commissioner in the findings of fact. Either alternative

points to a competent producing cause, and incorporating the facts as found in the opinion of the Commissioner took from rather than added to the award. These findings in awards of the Commission have been repeatedly criticised, and information comes to us that the practice has ceased.

I am in favor of affirming the award.

Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of NAPOLEON POSEY, Respondent, for Compensation under the Workmen's Compensation Law, v. PATRICK MOYNEHAN, Employer, and the OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law — hazardous occupation — lumbering — injury received while plant temporarily inactive — farm laborer — chore or barnman not engaged in farm labor — election by employer to come under provisions of statute.

The claimant was employed as chore or barnman around the headquarters of his employer, a lumber operator, who employed from four to one hundred men, and maintained several camps. At the headquarters there were a store and office, barns for a large number of horses and a boarding house for employees, and in connection with said headquarters there were several hundred acres of land which were cultivated as an adjunct to the principal business. It was the claimant's occupation to care and look after the horses and to assist around the boarding house, and his injury was received by a fall while going from the boarding house to the store. At the time of the injury the plant was temporarily inactive, but fully manned.

Held, that the employee was engaged in a hazardous occupation under group 14 of section 2 of the Workmen's Compensation Law.

The temporary lull in the activities of the plant did not relieve the insurance carrier from liability.

The evidence justified the finding that the employee was not engaged in farming at the time of the injury.

Furthermore, the employer elected to come within the provisions of the Workmen's Compensation Law by posting notices so stating in the men's rooms at the boarding house, which comprised one of the buildings at his headquarters.

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Third Department, February, 1921.

APPEAL by the defendants, Patrick Moynehan and another, from a decision and award of the State Industrial Commission, entered in the office of said Commission on or about the 9th day of June, 1920.

Robert H. Woody [*Norman G. Hewitt* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*Bernard L. Shientag*, *E. C. Aiken*, Deputy Attorney-General, and *Francis H. Slater*, of counsel], for the respondents.

KILEY, J.:

There is no question here about the accident, the extent of the injuries received, nor the work actually being performed by the claimant. The contest against claimant is the application of the law to the facts as they appear in the record. If a question of fact was created, the finding of the Commission must stand. (Workmen's Compensation Law, § 20, as amd. by Laws of 1919, chap. 629.) The employer was a large lumber operator; had been for many years previous to the year 1917. He maintained several lumber camps on different jobs in the Adirondack forests in the northern part of this State. All of these several jobs, and all of the operations with reference thereto, were directed from one central point termed his headquarters, and located at Sabattis, Hamilton county, N. Y. This was at a railroad station, a small settlement in the wilderness, and so far as the record discloses, all owned and operated by the employer, Moynehan. There was a store and office combined, a boarding house fitted and constructed for lumber men, and run by the employer, a large barn with ninety horse capacity and space for hay and grain of like capacity; sheds for storage of tools, sleighs, wagons, etc. He employed many men in his lumbering operations, sometimes one hundred, sometimes less and at all times more than four. It was a hazardous occupation under section 2, group 14, of the Workmen's Compensation Law (as amd. by Laws of 1917, chap. 705).^{*} Around this central point, herein called headquarters by the employer, and farm by the insurance carrier, were located

^{*} Since amd. by Laws of 1918, chap. 635.— [Rmp.]

from 200 to 400 acres of land owned by the employer; as a matter of fact he owned thousands of acres; this land immediately adjacent to this center of operations was used by the employer to raise hay and potatoes, using the same, so far as needed, in his lumbering business. Claimant was a chore or barnman at these headquarters. He did what he was called upon to do around the boarding house and cared for the employer's and transients' horses that put up at the stables. When the employer's horses were not needed upon some of the jobs they were brought to this stable to be cared for, and in warm weather were turned out to pasture on this acreage. It was claimant's occupation to care for and look after these horses. That this central group of buildings and the operations carried on at, and directed therefrom, in connection with the larger operation of actual lumbering, were all a part of the larger enterprise was a question of fact found by the Commission, and so found on evidence legal and of probative force. Section 3, subdivision 4, of the Workmen's Compensation Law (as am'd. by Laws of 1916, chap. 622, and Laws of 1917, chap. 705) defines "employee" as follows: "'Employee' means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants." The foregoing was the law on September 15, 1917, when claimant, in the course of his employment, was going from the boarding house toward the store, fell and broke both knee caps, which accident has left him in the crippled condition found by the Commission. I judge from the record that if all of the facts were known claimant could have made his claim under second group 45 of section 2 of the Workmen's Compensation Law (as added by Laws of 1918, chap. 634). The question is not presented here; the observation is made to recall the possibilities under this law and the progressive tendency of the same. The employer's business was conducted more or less through superintendents and overseers, one of whom made application for the insurance found by the Commission to

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cover this claimant. The employer stated that claimant was covered and was one among his employees he had insured. The appellant carrier resists payment of the award upon two grounds: *First*. That the employee, at the time of the accident, was not engaged in the actual operation of cutting trees and skidding and getting out logs. It appears from the record that the employer was sick that year unto death and while not actually and actively carrying on the operation of lumberman as he had theretofore for twenty years and upwards, yet his plant was intact, his facilities ready, and his headquarters as fully manned as at any time; the temporary lull in activity did not render appellant's liability under its contract any the less because of such temporary lull in active operations. *Second*. That the employer was engaged in farming and it was in such occupation the claimant was occupied when injured. It was a question of fact for the Commission to pass upon from all of the evidence and I do not think we can disturb its finding. However, a further advantage to the claimant is disclosed by the record. The employer elected to come under the provisions of this law, as appears from the evidence to the effect that he had posted notices so stating in the men's room at the boarding house comprising a portion of the buildings at headquarters. This accident happened September 15, 1917. Chapter 622 of the Laws of 1916 took effect June 1, 1916, and chapter 705 of the Laws of 1917 went into effect July 1, 1917. Subdivision 5 of section 3 of the Workmen's Compensation Law was amended by those chapters to read as follows: "'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith, *except* where the employer and his employees have by their joint election elected to become subject to the provisions of this chapter as provided in section two." The employer, by posting the notices, complied with the requirements of section 2 (as amd. by Laws of 1916, chap. 622, and Laws of 1917, chap. 705). *Matter of Dose v. Moehle Lithographic Co.* (221 N. Y. 401) must be regarded as salutary and comforting by this claimant.

The award should be affirmed.

Award unanimously affirmed.

AMELIA CARROLL, Respondent, v. GIMBEL BROTHERS, NEW YORK, Appellant.

First Department, March 4, 1921.

False imprisonment — action by alleged shoplifter for damages for unlawful arrest and detention resulting in neurasthenia — verdict contrary to evidence — erroneous rejection of evidence as to confession of theft of other articles — extent of best evidence rule — insufficiency of evidence as to existence of neurasthenia.

Plaintiff sought damages for her alleged unlawful arrest and detention by the members of the detective force of a department store on the charge of stealing certain thimbles. Plaintiff's evidence tended to show that she had entered defendant's store to purchase a thimble, and, on being informed that it could not be exchanged, left the store when she was accosted by a store detective, taken to the defendant's office and searched, the thimble not being found. Defendant's evidence tended to show that when plaintiff was searched articles from defendant's drug department were found in her bag, which she acknowledged taking and requested that she be allowed to pay therefor; that she was seen both by a detective and at least one disinterested witness to take two or three thimbles from the tray, go to the basement and not return them; that the saleslady having charge of the thimble counter noticed the loss of the thimbles on returning from waiting on a customer; that three thimbles were later found in a box on the floor of the room near where plaintiff sat during the investigation, and that a written confession of the theft of the other articles from defendant's store was signed by her after the same was read to and by her.

Held, that the verdict of the jury in plaintiff's favor was against the weight of the evidence.

It was substantial error to exclude testimony offered by the defendant that the several drug articles found in plaintiff's bag all bore the defendant's stamp and tag, on the theory that the articles themselves were the best evidence.

It seems, that the best evidence rule relates entirely to documentary evidence. That plaintiff is suffering from neurasthenia is not proven by medical testimony by one physician to the effect that her physical condition was not "bad" except that she is of a nervous type. Her nervous condition is poor," and by another physician who had treated her ten times, professionally, to the effect that her ailment was neurasthenia, although supplemented by testimony of the plaintiff as to her nervous condition.

APPEAL by the defendant, Gimbel Brothers, New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Bronx on

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the 31st day of January, 1920, upon the verdict of a jury for \$3,500, and also from an order entered in said clerk's office on the 18th day of February, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

John E. Tracy of counsel [*Rose & Paskus*, attorneys], for the appellant.

George L. Donnellan, for the respondent.

MERRELL, J.:

The plaintiff, respondent, has recovered judgment against the defendant, appellant, in the sum of \$3,637.85, based upon the verdict of a jury in plaintiff's favor and against defendant for the sum of \$3,500.

The action was brought to recover damages for the arrest and detention of the plaintiff by Gimbel Brothers, New York, a domestic corporation. The defendant conducts a department store near the junction of Sixth avenue and Broadway in the borough of Manhattan. The plaintiff testified that on December 18, 1918, shortly before six o'clock at night, she entered the department store of the defendant with a view of looking over their Christmas goods there displayed and with the intention of purchasing a thimble as a Christmas gift to a relative. Plaintiff testified that on the day in question she had left her home in the borough of The Bronx and had first gone to Hearn's department store on Fourteenth street in the city of New York, and had there made certain purchases of Christmas gifts, which she ordered sent to her home; that she then walked to the military hospital at Eighteenth street and Sixth avenue and there took the elevated to the store of R. H. Macy & Co. on Broadway near Thirty-fourth street, and that there she purchased certain articles, consisting of hair pins and drugs, and from there went through the department store of Saks & Co., and from there to the store of the defendant. Plaintiff testified that she entered the defendant's store on the Broadway side, and walking through the main floor, came to the thimble counter where she inquired of the saleswoman in charge with reference to purchasing a silver thimble for her sister as a Christmas present; that plaintiff

made some inquiry of the saleslady as to exchanging the thimble in case it was unsatisfactory, and was told that the exchange could be made only within three days; that plaintiff then told the saleslady that she would be unable to take the thimble as she could not revisit the store within that time; that she laid down the thimble that she had been inspecting and proceeded to look at other articles in the store, visiting the basement, and finally leaving the store by the Broadway entrance with a view of returning to her home in The Bronx. The plaintiff then testified that when she had left the store and was on the street and about to cross toward the east with a view of taking the Third avenue elevated she was arrested and forcibly detained by a woman whom she recognized as present at the trial and who was a Miss Hager, a detective and floorwalker in defendant's employ. Plaintiff testified that this detective commanded that she return to defendant's store and pay for the thimble she had stolen; that plaintiff inquired what thimble, and insisted that she had stolen no thimble and had no thimble; that the detective required that she return with her, and compelled her to do so against her remonstrance and statement that she wished to go home to her baby. Plaintiff testified that she was taken inside defendant's store and upstairs to a small room and was shortly ushered into another room and a search was made of her clothing and the handbag which she carried; that in the bag there were certain drug articles, consisting of lapactic pills, aspirin, sal hepatica and other articles, some half-dozen in number. Plaintiff testified that the detective searched her clothing with a view of finding the missing thimbles, but found none; that plaintiff insisted that she wanted to go home and was directed by the detective to keep quiet. The plaintiff testified that the drugs and other articles in her handbag she had purchased at Macy's before entering the defendant's store. Plaintiff said she was then ushered into a room where there were two men, and a list of the property contained in her handbag was taken, and that she was there compelled, through threats of imprisonment, to sign a general release and a confession that she had stolen the drug articles before mentioned. Plaintiff insists that she never had any knowledge of the contents of the papers which she signed; that she could not read without the

aid of glasses, and did not have her eye-glasses with her, and that she was in an extremely nervous condition and did not know the purport of the papers which she signed. She testified that after being detained about half an hour she was released and proceeded to her home. The plaintiff testified that as the result of her arrest and detention she became nervous and unstrung, and that her previous good state of health was ruined, and that she suffered great nervousness and debility as the result of the treatment which she had received from the defendant's employees.

As to her physical condition prior to and following her arrest, plaintiff swore her family physician who had treated her prior to the occurrence on December 18, 1918, and who testified that with the exception of family ailments, confinement, colds and general family sickness, the plaintiff was in good physical condition and was not nervous. The physician further testified that he had examined her shortly prior to the trial and that "her nervous condition is poor." The plaintiff also swore as a witness as to her physical condition Dr. John R. Farrell, who testified that he had treated the plaintiff since May, 1919, and that she was suffering from neurasthenia. With the exception of two witnesses who were permitted to swear to the plaintiff's good character and reputation, this completed the plaintiff's testimony.

The defendant first swore as a witness one Fanny Sheier, who testified that for a short time prior to the holidays in 1918 she was employed as a saleslady in the defendant's store, and that she was in charge of the thimble counter there at the time of plaintiff's visitation on December 18, 1918. Miss Sheier testified that on that occasion at plaintiff's request she exhibited to her a tray of silver thimbles, and that as her attention was attracted to another customer two or three of the thimbles were taken from the tray; that the witness missed the thimbles immediately upon turning around; that she saw at the time that the defendant's floorwalker, Miss Hager, had observed what had occurred, and gave no further attention to the matter. The witness Sheier was very positive that as she momentarily withdrew her eyes from the tray, two or three of the thimbles were taken from it.

Hattie J. Hager was sworn as a witness by the defendant

and testified that prior to Christmas, 1918, she was employed by the defendant as a detective and had had five years' previous experience at Bloomingdale's in a like capacity. Miss Hager testified that on the day in question she was walking about the store in the discharge of her duties, which were to see that merchandise should not be disturbed by customers; that shortly before closing time, at six o'clock in the evening, her attention was attracted by the plaintiff's actions; that she constantly turned around, looking about her; that she walked over to the silver counter where the thimbles were displayed, and that the witness watched her; that the plaintiff tried on several thimbles on her right hand from a tray which had been left by the saleslady who was attending to another customer; that the plaintiff placed one or two of the thimbles in the palm of her hand and walked away from the counter; that the witness followed the plaintiff down the store, and that the latter walked down into the basement, but before doing so again turned around; that as she walked down into the basement and was standing near the pole at the foot of the stairway plaintiff again looked around and did something with her skirt as though she was lifting it up, and put something in her underskirt; that shortly thereafter the plaintiff ascended to the main floor, and finally left the store by the Thirty-third street entrance. The witness testified that she then accosted the plaintiff and told her that she had forgotten to pay for the thimble; that the plaintiff denied having any thimble, and that the witness then told her that she had seen her taking a thimble, and that the plaintiff replied that she had not any thimble. The witness testified that she had seen her taking a thimble, and that the plaintiff replied that she had not any thimble. The witness testified that she then asked plaintiff to go to the office, and that on the way the plaintiff stated that she was awfully sorry for the occurrence. The plaintiff, according to this witness, was taken to an ante room used as a locker room for the employees of the store, and that she then asked the plaintiff where the thimbles were, and that the plaintiff replied, "Well, you will find them all right," and that the witness then asked the plaintiff what she had in her bag, and that the plaintiff replied that she had some drugs and asked if she could pay for them

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and said she was awfully sorry and really more than sorry for the occurrence; that at the suggestion of the witness the plaintiff then visited the desk of the investigator's bureau where a Mr. Rohan, employed by the defendant as an investigator, was seated, and that the plaintiff then told Rohan that she was very sorry and asked permission to pay for the articles which she had in her bag, and at the suggestion of Rohan the plaintiff signified her willingness to sign papers which were there presented to her; that the plaintiff then stated: "I have taken the drugs from your department, but I have not taken the thimbles." The witness then testified that the investigator Rohan then read to plaintiff twice the release which had been prepared and a written confession, and that the plaintiff signed both. The drug articles were then upon the table in the presence of the plaintiff, Rohan and the witness, and were then from there taken and put back into stock. The thimbles were not found upon the plaintiff. The plaintiff was then told to leave the store and not return again. The release which the plaintiff admits she signed was in the usual form of a general release, and the confession statement which the plaintiff also signed, both instruments being witnessed by Mr. Rohan and Miss Hager, confessed that on December 18, 1918, between the hours of four and five o'clock P. M., the plaintiff had taken from the defendant the following articles, one sal hepatica; one ex-lax; one hair pins; one lapactic; one aspirin; all of the value of one dollar and sixty cents; and that she had taken them with intent to appropriate the same to her own use without intending to pay Gimbel Brothers therefor or compensate them in any way; that she knew Gimbel Brothers to be the owner of the merchandise taken by her; that she willfully and unlawfully stole said merchandise. Miss Hager further testified that the following morning as she was removing her rubbers in the locker room she saw something in a box which was kept there for merchandise packages and upon investigation found three silver thimbles; that the plaintiff was seated near said box and for a time was alone prior to being ushered into the presence of the investigator on the evening previous.

All of the drugs found in the plaintiff's bag were returned

at once to the defendant's stock from which they had been taken.

The defendant also swore as a witness one Rose Mackenberg, who testified that on the occasion in question she had called at the defendant's store and was waiting for the closing hour when she and Miss Hager, her friend, were going to the theatre; that she roomed with Miss Hager, and that she was standing a few feet distant from the thimble counter and saw plaintiff take two or more of the thimbles in the palm of her hand and descend to the basement of the defendant's store. Miss Mackenberg testified that she had previously called Miss Hager's attention to the peculiar actions of the plaintiff and that out of curiosity she followed the plaintiff to the basement and saw her place the thimbles in a handkerchief or some white cloth and conceal the same under her dress.

The defendant also produced as a witness its investigator, James A. Rohan, who substantially corroborated Miss Hager in the transaction with reference to plaintiff's confession of having stolen the drug articles, and the execution of the release and written confession, testifying that the latter instruments were both read over by him to the plaintiff, and that she in turn read and voluntarily signed them, fully understanding and appreciating their contents.

Howard Browne, who was chief investigator for the defendant, and who was also present at the time of the alleged confession of the plaintiff, corroborated the testimony of Miss Hager and Rohan with reference thereto, testifying that Rohan read the two written documents to the plaintiff, and that the plaintiff herself read them and voluntarily signed the same.

This completed the testimony in the case, aside from certain questions on rebuttal which were asked of and answered by the plaintiff.

From a careful examination of the evidence in the case, I am of the opinion that the verdict of the jury was clearly against the weight of the evidence, and that the plaintiff did not establish a cause of action against the defendant by a fair preponderance of the evidence. It is impossible to read the testimony without being convinced that the witnesses for the defendant related the transaction with reference to the

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taking of the thimbles and as to the confession of the plaintiff of the theft of the drug articles with substantial truthfulness. With the exception of the witness Browne, none of the defendant's witnesses was in the defendant's employ at the time of the trial. The witness Mackenberg was apparently entirely disinterested at all times and was a mere spectator of the theft of the thimbles by the plaintiff. I think that the verdict should be set aside and a new trial directed upon the ground that the verdict was against the weight of evidence.

I am also of the opinion that substantial error occurred during the progress of the trial by the exclusion of the testimony offered on the part of the defendant that the several drug articles found in the plaintiff's bag and which she testified she had purchased at Macy's all bore the stamp and tag of the defendant. The plaintiff objected to such testimony upon the ground that the articles themselves were the best evidence. It seems to me that the best evidence rule relates entirely to documentary evidence, and that it was competent for the defendant's witnesses to testify that the articles which they found upon the plaintiff all bore the trade mark or tag of the defendant. Moreover, the testimony conclusively shows that these drug articles, upon the plaintiff's execution of the written confession of having stolen the same, were at once returned to the defendant's stock and, therefore, could not be produced upon the trial, and for this reason secondary evidence should have been permitted as to any memoranda or tags attached to said articles, showing merely that said articles came from defendant's stock.

The verdict itself was for damages greatly in excess of anything justified by the evidence given in behalf of the plaintiff. One of her doctors merely testified that plaintiff's physical condition was not bad, "except that she is of a nervous type. Her nervous condition is poor." The only other medical testimony as to plaintiff's physical condition was furnished by Dr. Farrell, who testified that he had treated plaintiff since May, 1919, professionally about ten times, and that her ailment was "neurasthenia," meaning "nervous breakdown." These bare morsels of medical testimony were, of course, supplemented by the testimony of the plaintiff as to her nervous condition, but all of the testimony upon this

subject would be entirely insufficient to support the verdict which was rendered. However, as we reverse the judgment and grant a new trial upon the ground that the verdict is contrary to the weight of the evidence and for error upon the trial, it is unnecessary to consider the question as to the amount of plaintiff's recovery.

The judgment and order appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,
concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

ISAAC MAURICE JACOBS, Appellant, Respondent, v. JOSEPH H. MOORE and Others, Copartners; Doing Business under the Firm Name and Style of MOORE, LEONARD & LYNCH, Respondents, Appellants.

First Department, March 4, 1921.

Principal and agent — stockbrokers — evidence not establishing conversion of stock — acceptance of check and retention of proceeds thereof by customer constitutes ratification of broker's acts respecting sale of stock.

In an action by a customer against a firm of stockbrokers for the alleged conversion of stock, the question was presented as to whether the defendants had agreed to carry said stock for the plaintiff as claimed by him, or whether the sale was to be strictly for cash, the balance to be paid on a certain date, as claimed by the defendants.

Held, on all the evidence, that the defendants did not convert the stock by a sale thereof on plaintiff's failure to pay, and that their motion for a dismissal of the complaint should have been granted.

Where a customer accepts a check from his stockbroker for an unliquidated claim and retains the proceeds thereof, he thereby ratifies the broker's acts as his agent, and cannot thereafter be heard to dispute or repudiate the same or claim damages for an alleged conversion of the stock involved. PAGE, J., dissents, in part.

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First Department, March, 1921.

CROSS-APPEALS by the plaintiff, Isaac Maurice Jacobs, and by the defendants, Joseph H. Moore and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of July, 1920, upon the verdict of a jury rendered by direction of the court.

John E. O'Brien of counsel [*Charles J. Katzenstein*, attorney], for the plaintiff.

Reese D. Alsop of counsel [*Hunt, Hill & Betts*, attorneys], for the defendants.

MERRELL, J.:

This action was brought to recover the sum of \$10,000 and interest, damages which the plaintiff claims to have suffered by reason of the conversion by the defendants of 5,000 shares of stock of the Mines Holding Company, a Delaware corporation. The defendants are copartners doing business as stockbrokers in the city of New York and elsewhere under the firm name and style of Moore, Leonard & Lynch. The plaintiff is the president and treasurer of a weekly publication known as the *New York Financial Examiner*, published in the city of New York.

For many years prior to the occurrences involved in this action plaintiff had speculated extensively in stocks and securities. In his complaint the plaintiff alleges that in April, 1917, the defendants, as stockbrokers, agreed to and with the plaintiff to purchase for him 5,000 shares of stock of said Mines Holding Company, and that in consideration thereof the plaintiff agreed to pay the defendants therefor the purchase price of said stock, together with their commissions thereon. The plaintiff alleges that the defendants did, upon plaintiff's order and pursuant to their agreement with the plaintiff, on or about April 30, 1917, purchase in the market for the account of the plaintiff 5,000 shares of the stock of said corporation at the price of \$1.25 per share, and thereafter held the same as the stockbrokers and agents of the plaintiff and for his account; that at the time of employing the defendants to purchase said shares the plaintiff deposited with said defendants the sum of \$1,100 and agreed to pay the

balance of the purchase price of said shares of stock when the defendants should obtain and deliver the same to the plaintiff. The plaintiff alleges that thereafter he duly offered and tendered to defendants the balance of the purchase price of said stock and demanded delivery thereof, but that defendants refused to accept such balance of the purchase price or to deliver to the plaintiff such shares of stock, but, without the leave, consent or permission of the plaintiff and contrary to his express directions, converted said shares to their own use and benefit and sold or otherwise disposed thereof. Alleging that said shares of stock were worth thereafter in the market at divers time \$2 per share, the plaintiff claims to have suffered damage by reason of defendants' acts in the sum of \$10,000, for which judgment is demanded.

The defendants answered in the action denying generally the agreement alleged and set forth in plaintiff's complaint and the other allegations in plaintiff's complaint with reference to the deposit by the plaintiff with the defendants of the \$1,100 for the purposes set forth in the complaint, the purchase of the stock, its conversion, and that plaintiff has suffered the damages alleged and set forth in said complaint.

The defendants, as a separate defense, allege in their answer that on or about April 26, 1917, at the plaintiff's request and upon his promise to pay therefor in full forthwith, together with a commission to the defendants as stockbrokers, and upon plaintiff's deposit with the defendants of the sum of \$600 on account of the purchase price thereof, the defendants agreed to buy for plaintiff 3,000 shares of the stock of said Mines Holding Company at \$1.25 per share, or less, if the same could be bought in the market, it being expressly understood and agreed by and between the plaintiff and defendants that defendants would not carry the said stock on a margin for the plaintiff's account, and that plaintiff would pay the defendants for the same in full, with the commission, when the same was bought. The defendants allege that on April 28, 1917, pursuant to said agreement, they bought 3,000 shares of the stock of said company at \$1.25 per share. Defendants further allege that thereafter and on April 28, 1917, at plaintiff's request and on his promise to pay therefor in full forthwith, together with a commission to defendants as stockbrokers,

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the defendants agreed to buy for plaintiff 2,000 more shares of the stock of the Mines Holding Company at \$1.3125 per share, or less, if the same could be bought at such price in the market, and that it was expressly understood and agreed by and between the plaintiff and the defendants that the defendants would not carry said stock on a margin for plaintiff's account, and that the plaintiff would pay the defendants for same in full, with commission, when bought, and that the defendants, pursuant to such agreement, did thereafter and on April 28, 1917, purchase for plaintiff said 2,000 additional shares of the stock of said company, paying therefor \$1.25 per share. At the time of ordering defendants to purchase the additional 2,000 shares of said stock plaintiff deposited with the defendants the sum of \$500. The defendants further allege that on or about said April 28, 1917, the agreement under which the defendants had purchased the 5,000 shares of said stock was by mutual agreement between the parties amended, defendants consenting and plaintiff expressly agreeing to pay defendants the full purchase price of said 5,000 shares of stock, together with a commission to the defendants, on or before Wednesday, May 2, 1917, in full settlement therefor. The defendants further allege that plaintiff wholly failed and refused to perform said contract on his part and refused and failed to pay the defendants the balance of the purchase price of said stock on May 2, 1917, as he had agreed, and thereby by his breach and default released and discharged the defendants from all liability or obligation under said contract. Defendants further allege that thereafter and on or before May 4, 1917, the defendants sold 4,000 shares of said stock in the market at \$1.375 per share and the remaining 1,000 shares at \$1.3125 per share, and on or about said last-mentioned date duly notified the plaintiff that said stock had been sold; that plaintiff objected to said sale and disputed the right of the defendants to have made the same. The defendants further allege that thereafter and on or about May 8, 1917, the defendants duly delivered to the plaintiff a letter and statement showing the sale of the 5,000 shares of said Mines Holding Company stock as above described and notifying the plaintiff that defendants had charged him interest amounting to \$5.52 on the transaction and a commission of one thirty-

second of \$1 for buying said stock and a like commission for selling the same, and that there then remained due in accordance with the statement then furnished by defendants to the plaintiff the sum of \$1,342.98, and that at the same time the defendants delivered to plaintiff their check for said last-mentioned sum, together with said statement; that plaintiff duly accepted said statement and check in full settlement of all accounts between them and made no objection to said statement within a reasonable time thereafter and cashed said check and has always retained the money received therefrom.

For a second separate defense the defendants allege, upon information and belief, that for a month or more following May 4, 1917, when they sold and disposed of said shares of stock upon the market, said stock could have been purchased at one dollar and twenty-five cents per share, and that at no time after said May 4, 1917, did the price of said stock in the market exceed the sum of one dollar and thirty-seven and one-half cents per share. The defendants further allege that a month or more after May 4, 1917, transactions in the market in the said stock ceased.

The issues raised by the pleadings coming on for trial, the parties stipulated in open court to try the case without a jury, and that the court might direct a verdict with the same force and effect as though a jury were present.

Upon the trial the plaintiff testified that he was in the city of Pittsburgh, Penn., where the defendants maintained a branch office; on April 26, 27 and 28, 1917. It was stipulated upon the trial that on April twenty-sixth and twenty-seventh the plaintiff requested the defendants to purchase 5,000 shares of the stock of the Mines Holding Company, and that the defendants promised to do so upon receipt of \$200 per 1,000 shares, and that plaintiff thereupon paid the defendants \$1,100; that on April 28 or 30, 1917, the defendants purchased for the plaintiff said 5,000 shares of stock at \$1.25 per share, or a total of \$6,250; that for that service the defendants charged the plaintiff a commission of one-thirty-second of \$1 a share, or a total commission of \$156.50. It was further stipulated that on May 3, 1917, the defendants telegraphed from their Pittsburgh office to plaintiff at Detroit, as follows:

" 5:50 P. M., Pittsburgh, Pennsylvania. May 3rd, 1917.

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I. M. Jacobs, Hotel Statler, Detroit, Michigan (care of R. A.). You have not paid for the five thousand shares of Mines Holding Company stock as you promised. Will sell same at ten o'clock May 4, 1917, on New York curb unless payment in full in our hands before that time. Moore, Leonard & Lynch," and that the plaintiff received said telegram in Detroit on the morning of May 4, 1917.

Thereupon, in the course of the trial, the defendants made certain admissions to the effect that plaintiff, on or about April 27 and 28, 1917, had employed the defendants to purchase for him 5,000 shares of the Mines Holding Company stock, depositing with the defendants the sum of \$1,100 on account thereof, and that pursuant to such employment the defendants did purchase for plaintiff's account said 5,000 shares of said stock, paying therefor at the rate of \$1.25 per share, and charging the plaintiff therefor the sum of \$6,250 together with their commission, amounting to \$156.50, and that on April 28, 1917, the defendants gave to plaintiff a statement to that effect, crediting plaintiff with the payment of \$1,100 on account thereof.

With reference to the transaction between the parties, the plaintiff testified that he went to the Pittsburgh office of the defendants on April 26, 1917, and solicited a subscription for his periodical, and that defendants' representative there, a man by the name of Lamb, subscribed for said periodical, paying plaintiff \$2 therefor. Plaintiff testified that he then told Lamb, defendants' representative, that he wanted to buy a few thousand shares of Mines Holding, and gave Lamb an order that day to purchase 3,000 shares of said stock and paid Lamb \$600 upon account. Plaintiff further testified that there was conversation between himself and Lamb as to when he would pay the balance of the purchase price of said stock, and that the plaintiff said: "When you have received the stock I will pay for it. It will take about ten days before you get that stock, and I will notify you if I happen to come back to Pittsburgh in the meantime." Plaintiff testified that he told Lamb he would be there and come and see them, or that they might notify his New York office, and that he could pay them either at the office in Pittsburgh or in their office in New York, which was just across Broadway from

plaintiff's New York office. Plaintiff testifies that he told defendants' representative that he was going to visit his daughter and would go and make several western towns in the interest of his paper, and would keep him posted where plaintiff was at all times. Plaintiff further testified that he received on April 28, 1917, from the defendants a statement, which was introduced in evidence, showing the account between himself and the defendants for the purchase of the 5,000 shares of Mines Holding Company stock; that it appeared by that statement that he had paid the defendants therefor in cash on April twenty-sixth \$600 and on April twenty-seventh \$500, and that the balance of the purchase price for said stock was \$5,306.30. The plaintiff testified that after spending several days with his daughter in Cleveland, he then went to the city of Detroit, arriving there on the morning of May 4, 1917; that he proceeded to the Hotel Statler at Detroit, and upon his arrival found a telegram from the defendants notifying him that unless they received the balance of the purchase price of said stock at or before ten o'clock on May 4, 1917, they would sell the same on the market for his account. Plaintiff testified that this telegram was received and read by him about nine o'clock A. M., on May fourth, Detroit time. He testified that he immediately went to the telegraph office and telegraphed the defendants that under no circumstances were they to sell said stock and directing them to ship the same with draft attached to his New York office. Plaintiff further testified that he immediately made an effort to reach the defendants' Pittsburgh office over the long distance telephone, and within half to three-quarters of an hour obtained connections with defendants' Pittsburgh office and was informed that his stock had already been sold. Later on in the day plaintiff testified that he received another telegram from the defendants in response to his telegram, as follows:

"Your telegram received. You failed to pay for stock pursuant to your promise two days ago and still fail to place Pittsburgh or New York office in funds. Have sold four thousand shares at one and three-eighths and one thousand at one and five-sixteenths."

The plaintiff testified that he at once returned to New York, reaching the latter city on May sixth, and that he immediately

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visited the defendants' office and had a conversation with Mr. Leonard, one of the defendants, saying to him, "Mr. Leonard, I am here to take up that stock that you bought for me," and that Leonard ordered him out of the office and directed him to see defendants' attorney, refusing to talk with the plaintiff. Upon cross-examination the plaintiff admitted that on or about May 8, 1917, he received from the defendants a letter in the following form:

" NEW YORK, May 8, 1917.

" Mr. I. M. JACOBS,

" 7 Pine Street,

" New York, N. Y.:

" DEAR SIR.— Enclosed you will find check for \$1342.98, closing out your account with us. 4000 shares were sold at 1-3/8 and 100 shares at 1-5/16. There is an interest charge of \$5.52, and we have charged you 1/32 for buying and 1/32 for selling the stock.

" Yours very truly,

" EWL-L.

MOORE, LEONARD & LYNCH."

That inclosed in said letter was the check for \$1,342.98 therein referred to. Plaintiff further admitted that he had indorsed said check by writing his name upon the back thereof. The evidence shows that the plaintiff received said check without objection, and cashed the same, and retained the proceeds thereof.

Owing to the illness of the wife of defendants' Pennsylvania manager, Mr. William J. Lamb, the latter was unable to be present upon the trial as a witness, and upon stipulation of the parties it was agreed that if said Lamb were present he would testify that the plaintiff came to the defendants' Pittsburgh office on April 26, 1917, and asked Lamb if the defendants would buy 3,000 shares of the stock of the Mines Holding Company on the New York curb and carry it for him on margin; that Lamb replied that the defendants would not carry the stock, as they made it a general custom not to carry stocks on margin which were only dealt in on the New York curb, and that plaintiff then asked him how much the defendants would want by way of deposit against ordering 3,000 shares of the stock for him, and that Mr. Lamb replied that they would

order the stock upon deposit of \$200 per 1,000 shares, but upon the understanding only that the stock would be paid for in full, and that the defendants would not carry it on margin; that plaintiff thereupon deposited \$600 with defendants and requested them to purchase for him 3,000 shares of said stock at \$1.25 per share; that on April 28, 1917, plaintiff again called at defendants' Pittsburgh office, the defendants in the meantime having been unable to fill plaintiff's order; that plaintiff then raised his bid to \$1.31¼ per share, and further requested defendants to buy 5,000 instead of 3,000 shares and deposited with the defendants against said order an additional \$500; that Lamb again stated to the plaintiff that it would have to be a cash transaction, and they would not carry the stock for him on margin, but that he would have to pay for it in full; that plaintiff acquiesced in such arrangement, and that at two o'clock on the same day, which was Saturday, plaintiff again came to defendants' Pittsburgh office and requested a statement, which was given him, showing the purchase by the defendants for plaintiff of 5,000 shares of said stock at \$1.25 per share; that defendants charged him the usual brokers' commission of one thirty-second of \$1 per share, said commissions amounting to \$156.50, and that the purchase price of the stock was \$6,250; that after crediting plaintiff with \$1,100 which he had paid there remained owing to defendants on account of the transaction and the purchase of the stock a balance of \$5,306.50; that upon receiving such statement plaintiff stated that he was leaving Pittsburgh for Cleveland, O., to see his daughter, and that he would be back on Wednesday, May 2, 1917; that Lamb again stated that the defendants would not carry the stock on margin for the plaintiff, and that the plaintiff would have to pay for it in full on Wednesday, May 2, 1917, when he came back from Cleveland, and that the plaintiff stated that he would do so; that plaintiff then left without giving any address where he could be reached, beyond having shown Lamb a copy of a publication called the *New York Financial Examiner*, which bore upon its cover the plaintiff's name as editor; that when the plaintiff did not appear at or communicate with defendants' Pittsburgh office on Wednesday, May second, Lamb and the defendants tried to locate him through the defendants' New York office, through the

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New York Financial Examiner, to which he had referred, and in numerous other ways endeavored to locate the plaintiff, finally tracing him through Hotel Statler, Cleveland, to Hotel Statler, Detroit; that on Thursday, May 3, 1917, in the afternoon, defendants telegraphed plaintiff at Detroit, calling his attention to his failure to pay for the 5,000 shares of stock as he had promised, and notifying plaintiff that defendants would sell said stock at ten o'clock on May 4, 1917, on the New York curb unless the amount in full was received in their hands before that time; that after ten o'clock A. M. on May fourth the defendants received at their Pittsburgh office the following telegram:

"MOORE, LEONARD & LYNCH,

"Pittsburgh, Pa.:

"Under no circumstances sell stock, ship draft attached New York office.
I. M. JACOBS."

That later in the day Lamb talked with plaintiff over the long distance telephone in Detroit, and that plaintiff in his conversation demanded that defendants buy back the stock and stated that if defendants did not do so he would put the matter in the hands of attorneys; that plaintiff then for the first time informed Lamb that he had an office at 7 Pine street, New York city; and stated that he would be prepared to pay in full for the stock Monday, May 7, 1917, that Lamb stated to plaintiff that the stock had already been sold; that on May 7, 1917, the defendants received at their office in Pittsburgh a letter from plaintiff, dated May 6, 1917. In said letter the plaintiff expressed surprise at the sale of the 5,000 shares of Mines Holding stock bought through the defendants, and charging the defendants with illegal action in respect to such sale, and advising defendants to buy in said stock for cash for immediate delivery and avoid further damages and loss, and also stating that charges might be brought against them before the committee of the New York Stock Exchange for misconduct. In this letter the plaintiff also suggests that he might tell certain New York newspapers of the transaction, to defendants' disadvantage, and makes other suggestions of a threatening nature.

The evidence upon the trial presented a question of fact as to whether the defendants had purchased the 5,000 shares of stock and had agreed to carry the same for the plaintiff as claimed by him, or whether the transaction was as contended by the defendants, that the sale was to be strictly for cash, and that payment of the balance of the purchase price was to be made on May 2, 1917. If the plaintiff was right, then the defendants converted said stock by their sale thereof on May fourth upon the curb market, and are liable to the plaintiff for such damage as he has sustained by reason of such conversion. If, on the other hand, the sale was to be for cash, as claimed by defendants' Pittsburgh manager, Lamb, then the defendants, upon plaintiff's default, had a right to sell plaintiff's stock on his account as they did. By the sale on the curb on May 4, 1917, the entire 5,000 shares were sold at a profit, and, after deducting from the proceeds of such sale plaintiff's indebtedness for said stock, together with commissions, there remained a balance due plaintiff of \$1,342.98, which sum defendants paid to the plaintiff by check. This left a net gain to the plaintiff in the transaction of \$242.98.

At the close of the testimony, the court, it seems to me, contrary to the weight of the evidence, held with the plaintiff that there had been a conversion by the defendants of plaintiff's stock, but that it was plaintiff's duty to make defendants' loss as small as possible, and requested that the attorneys submit a computation as to the value of said stock at five, ten, fifteen, twenty, twenty-five and thirty days after the same was converted by the defendants, the court holding, in effect, that it was the duty of the plaintiff to lessen the loss and to go into the market and purchase the stock in order to lessen the damages suffered. Thereafter the court directed a verdict in favor of the plaintiff for \$492.83. It is impossible to learn from the record the basis whereby the court arrived at the amount for which said verdict was directed. So far as I have been able to discover, there is no basis in the evidence upon which the learned court could have properly directed the verdict which it did.

Both sides appealed from the judgment entered upon such directed verdict, the plaintiff claiming that the amount awarded him was inadequate, and the defendants contend-

ing that the judgment was in all respects erroneous and unauthorized.

It seems to me that under the facts presented by the evidence upon the trial the court improperly denied the defendants' motion to dismiss the complaint upon the ground that in accepting defendants' check for \$1,342.98 and cashing the same and in retaining the proceeds thereof, the plaintiff clearly ratified the sale of his stock by the defendants. The court has held that the defendants converted plaintiff's 5,000 shares of stock. The plaintiff finally claimed as damages a balance of \$3,345.25, besides interest thereon from May 4, 1917, whereas, the defendants insisted that in accordance with the statement which they furnished the plaintiff the transaction showed there was due plaintiff from the defendants thereon a balance of \$1,342.98, a net profit in the transaction to plaintiff of \$242.98. Under these circumstances, the parties claiming as above stated, the defendants delivered to the plaintiff their check upon his unliquidated claim for \$1,342.98. This check was accepted and retained by the plaintiff, and I think was a complete ratification by him of the defendants' acts as his agents, and that he cannot afterward be heard to dispute the same or to repudiate his agents' acts. The action was not upon contract, nor were the damages which the plaintiff suffered liquidated, and I think plaintiff's acceptance of defendants' offer in full settlement of this unliquidated claim, together with the statement of the transaction in connection with defendants' purchase of said shares of stock, and the retention by the plaintiff of the moneys paid him, acted as a ratification by the plaintiff of the defendants' acts.

I am, therefore, of the opinion that the trial court committed error in denying defendants' motion for a nonsuit and a dismissal of the complaint at the close of the evidence. The judgment of the Trial Term should be reversed upon defendants' appeal, with costs to the defendants, appellants, against the plaintiff, appellant, and the complaint dismissed, with costs. This disposes of plaintiff's appeal from the judgment for inadequacy of the verdict, but we do not allow costs to the defendants, appellants, upon plaintiff's appeal.

CLARKE, P. J., LAUGHLIN and SMITH, JJ., concur.

PAGE, J. (concurring):

I concur in the opinion of Mr. Justice MERRELL that the decision of the trial justice was contrary to the weight of the evidence, in holding that the defendants converted the stock of the plaintiff. In my opinion the plaintiff failed to establish by a preponderance of the evidence that the defendants agreed to carry the stock for him until a transfer thereof should be made on the books of the company and the certificates of stock so transferred should be received by the defendants. On the contrary, in my opinion the evidence on behalf of the defendants shows that the plaintiff promised to pay the balance due on or before Wednesday, May 2, 1917, and on plaintiff's failure the defendants had the right to sell the stock to satisfy their lien for the moneys advanced. The trial justice should have directed a verdict for the defendants.

In my opinion the court would not have been justified in dismissing the complaint upon the ground that in accepting the defendants' check for \$1,342.98, cashing the same and retaining the proceeds thereof, the plaintiff ratified the sale of his stock by the defendants.

The action was for a conversion. The conversion would be complete if the defendants made an illegal sale of plaintiff's property, and plaintiff became entitled to his damages, which would be the full value of the property. A subsequent return of the property, or the turning over of the proceeds of the sale thereof, would only go to the mitigation of the damages and not to the defeat of the cause of action. (*People v. Bank of North America*, 75 N. Y. 547, 564.)

Judgment reversed, with costs to defendants, and complaint dismissed, with costs.

SALLIE S. BROWN, Appellant, Respondent, v. THE CLEVELAND TRUST COMPANY, Respondent, Appellant.

First Department, March 4, 1921.

Husband and wife — alimony — agreement to secure payment of money in lieu of dower, alimony, etc., construed as guaranty on part of defendant — res judicata — former decision of Appellate Division between same parties on same issues binding — practical construction of contract by acquiescing in former judgment — conveyance of property by husband to defendant in trust as indemnity does not affect agreement.

Pending divorce proceedings by the plaintiff against her husband, a tripartite agreement was entered into between the plaintiff, her husband and the defendant whereby the husband agreed to pay to the plaintiff a certain sum monthly during the life of the plaintiff and the plaintiff accepted said payments in lieu of dower, alimony, etc., except as imposed by the agreement itself. Said agreement then provided that "to secure the prompt and punctual performance of the obligations" of the husband, he should convey to the defendant herein certain real estate, and it was then provided that in case the husband failed to pay said monthly installments the defendant "shall have the right to and shall, on demand of said party of the second part [the plaintiff], advance the said monthly payments," and that in case the husband failed to reimburse the defendant within thirty days the defendant should have the right to provide a fund, the income from which would be sufficient to provide for said monthly payments during the life of the plaintiff. On the same day that the agreement was executed the said property was deeded to the defendant. The decree of divorce recited the execution of said agreement. For a while payments were made by the husband, but later, at the request of the husband and without the knowledge of the plaintiff, the payments were made by the defendant. Subsequently, default having taken place in the payments, an action was begun against the defendant herein to recover the payments due and it was held therein that there was a personal obligation on the part of the defendant to pay the installments (*Brown v. Cleveland Trust Co.*, 139 App. Div. 932). The defendant did not attempt to review that decision but paid the judgment and the installments thereafter falling due till the default on which the present action is based. *Held*, that said contract was clearly one of guaranty whereby the defendant obligated itself in case of the default of the plaintiff's husband to pay the various sums which the latter had agreed to pay under the terms of the contract, and that the defendant's obligation continued throughout the lifetime of the plaintiff, and did not end with the exhaustion of the security which the husband had given to indemnify the defendant.

Furthermore, the Appellate Division having construed the contract in question to be an absolute guaranty and having affirmed the order of the Special Term granting plaintiff's motion for judgment on the pleadings in the prior action at law for the amount of the installments then due, cannot, in the present action, wherein the plaintiff asks for the same form of relief as that demanded in the former action, hold otherwise than that the plaintiff is entitled to judgment at law herein; the court is bound by its former decision.

Not only that, but the defendant acquiesced in such prior decision, paid the amount of the judgment awarded in the plaintiff's favor, and thereafter, for a period of five years, without objection or question, continued to pay the plaintiff her said installments. Such action on the part of the parties was a practical construction and interpretation of the contract and was entirely contrary to the present position of the defendant that it was acting simply as a trustee of the plaintiff.

So far as the trust agreement was concerned whereby the plaintiff's husband conveyed to the defendant certain real estate, that transaction was entirely between the husband and the defendant and was merely for the purpose of indemnifying the defendant for any payments which it might be compelled to make to the plaintiff under the terms of the agreement in question.

CROSS-APPEALS by the plaintiff, Sallie S. Brown, and the defendant, The Cleveland Trust Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of November, 1919, upon the decision of the court rendered after a trial at the New York Trial Term, the jury having been discharged by the court at the request and on consent of all the parties.

William C. Breed of counsel [*Eugene W. Leake* and *Edward A. Craighill, Jr.*, with him on the brief; *Breed, Abbott & Morgan*, attorneys], for the plaintiff.

George Gordon Battle of counsel [*Frank A. Quail* and *Addison A. Van Tine* with him on the brief; *O'Gorman, Battle & Vandiver*, attorneys], for the defendant.

MERRELL, J.:

On June 2, 1899, an action was pending in the Court of Common Pleas of Cuyahoga county, O., between the plaintiff herein, Sallie S. Brown, and her husband, John Hartness

Brown, wherein the plaintiff sought to obtain a decree of divorce from her said husband. During their married life the plaintiff had resided with her said husband in a magnificent home on Euclid Heights in or near the city of Cleveland, O. Plaintiff's husband was a man of large affairs and apparently of great wealth. For some time he had dealt extensively in real estate, owning a large amount of real property in and about the city of Cleveland, and was engaged in the development and disposition of the same. He was financially aided in his various real estate enterprises by the defendant herein, the Cleveland Trust Company. The divorce action between the plaintiff and her husband having reached a stage where a decree dissolving the marriage relations between the parties was imminent, the plaintiff and her husband reached an agreement whereby plaintiff's husband agreed to make over to her certain household furniture and a small amount of money, and agreed to pay to her each year so long as she lived for her maintenance and support the sum of \$2,400, said amount to be paid to her at the rate of \$200 in each month so long as she should live. In consideration thereof the plaintiff agreed to release all dower rights in any real property owned by her husband, and to release him from all obligations of every name and nature which the husband was obligated to perform by reason of the marital relationship between the plaintiff and himself. Said sum of \$2,400 a year was also to be in lieu of all alimony, maintenance and support, and was to be received by the plaintiff in lieu of dower and all rights of every kind and character which had theretofore accrued or might thereafter accrue to the plaintiff by reason of her marriage with her said husband. Having arrived at an agreement, on June 2, 1899, for the purpose of expressing the same and of securing to the plaintiff the payment of the sum of \$200 monthly during the period of her natural life, the husband, John H. Brown, party of the first part, the plaintiff, party of the second part, and the Cleveland Trust Company, the defendant herein, as party of the third part, entered into a written agreement. This agreement provided *first*, that the plaintiff should be paid by her husband the sum of \$2,400 per year payable in equal monthly installments of \$200, on the first day of each and every month from the date of the agreement

"during the life of said party of the second part," provided plaintiff did not remarry, and in event of her remarriage then the amount to be paid by her husband was to be reduced by one-half, and after such remarriage the plaintiff was to be paid the sum of \$100 per month during the remainder of her natural life. In consideration thereof the plaintiff, in and by said agreement, accepted said payments as above specified, "in lieu of all her dower or contingent right of dower, in the real estate of the said party of the first part, and in lieu of all claims against said party of the first part, for alimony, *alimony pendente lite*, maintenance and support, and all other claims and demands of every kind and character," except as imposed by the agreement itself. The agreement thus provided, *first*, for the payment to the plaintiff by her husband of \$200 per month during the remainder of her natural life or until she should remarry, and upon her remarriage that then during the remainder of her natural life her husband would pay to her the sum of \$100 per month, and that in consideration thereof the plaintiff was to release all claims for dower, maintenance, support or otherwise, growing out of her marriage with her said husband. These agreements were purely between the husband and the wife.

The tripartite agreement then, "to secure the prompt and punctual performance of the obligations of the party of the first part" (plaintiff's husband) under the terms of the agreement, provided that the husband should convey to the defendant, the Cleveland Trust Company, his residence property known as subplot No. 34 of the Euclid Heights allotment in Cuyahoga county, O. The agreement recites that for such purpose, to wit, to secure the prompt and punctual performance of the husband's obligation, he had that day conveyed to said defendant, the Cleveland Trust Company, said property together with all the appurtenances, in trust and upon certain terms and conditions specified in said agreement. Briefly stated, the conditions were that the trustee should hold the premises *during the life* of the plaintiff or until her husband should have delivered to the Cleveland Trust Company bonds, stocks or other property sufficient in the opinion of the officers of said trust company to entirely and safely secure the punctual payment of said sum of \$2,400 per annum by the husband to

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the wife. The trustee was to keep the property insured in such amount as in its judgment would safely and amply protect the interests of the wife, and the cost thereof was to be paid by the husband. The buildings were to be kept in repair by the husband, and all taxes were to be paid by him, or, in default thereof, the trustee might pay such taxes or make such repairs, and the expenses should be a lien upon said premises.

The contract then provided as follows: "In the event said party of the first part fails to pay to the party of the second part [plaintiff herein] any of said monthly payments hereinbefore provided, said party of the third part [the trust company] shall have the right to and *shall, on demand of said party of the second part, advance the said monthly payments at the rate of \$200 per month to the said party of the second part * * **"

The contract further provided that in the event that the said Cleveland Trust Company made advances for the purpose aforesaid the husband agreed, after thirty days' written notice to him from the said party of the third part, to reimburse it for any and all such advances or expenses, and that the said trust company should have the right if it deemed necessary to protect the plaintiff by providing a fund the income from which would be sufficient to provide for the payment of the monthly sums then due and payable to the plaintiff and to become due and payable *during the remainder of her natural life.*

The agreement further provided that upon the death of the wife any part of the property thus left with the trust company as security and unexpended by it should be returned to the husband by the said trust company.

On the same day when the said tripartite agreement was executed, plaintiff's husband conveyed to the defendant in trust said real estate by a full covenant warranty deed in which plaintiff joined releasing her inchoate right of dower in said premises. On June 9, 1899, said deed was duly recorded, and on the same day a decree of divorce was entered in said action in plaintiff's favor. Among other things, the decree recited that "the parties hereto have agreed upon their respective property rights as follows, namely, that in lieu of

alimony, dower and all other rights the defendant has agreed to pay to the plaintiff the sum of \$2,400 per year in equal monthly installments of \$200 each, payable on the first day of each and every month during her natural life, * * * and that provision has by contract been made to secure the payment of said sums." The decree ordered: "That the plaintiff shall hereafter upon the reasonable request of the defendant join him in any conveyance when it is necessary that her apparent dower in his properties should be released, and that upon failure of the plaintiff so to do, this decree shall operate as a release of such dower." At the time of the entry of this decree of divorce plaintiff's husband was a man apparently of large means, was a depositor with the defendant and associated with the defendant in extensive real estate dealings, until the property conveyed in trust was sold upon foreclosure sale in 1915. The property conveyed by Brown to the defendant was one of the show places of the city of Cleveland, and occupied a commanding position overlooking the lake. The house upon the property had been occupied by the parties during their married life and was built of graystone in Gothic style and stood on fine grounds and surroundings. Concededly the property at this time at a fair appraisal was worth from \$75,000 to \$80,000. From the time of the execution of the deed of trust to secure the payment of the monthly installments by the husband to the plaintiff, the husband was permitted by the trust company to remain in possession of the property which he had conveyed to it, rent free, and never from the time of the execution of the deed to the trust company until the final sale of the property on foreclosure was the husband compelled to pay a dollar for the use and occupation of said premises. It seems to be conceded that the fair rental value of the property during this period was far in excess of the amount which the trust company had obligated itself to pay to the plaintiff for her maintenance and support.

Following the execution of the agreement and until the latter part of 1903, plaintiff's husband paid to plaintiff the agreed monthly installments. These payments were sent by the husband's secretary in form of drafts of the defendant, Cleveland Trust Company, upon the Seaboard National Bank of New York, payable to the plaintiff's order. December 23,

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1903, without the knowledge of the plaintiff, her husband wrote to the defendant as follows:

" CLEVELAND TRUST COMPANY,

" December 23, 1903.

" City:

" GENTLEMEN.— Kindly pay \$200 monthly to Mrs. Sallie Spencer Brown, together with taxes against my property on Euclid Heights, until you receive further notice from me, and oblige,

Very truly yours,

" JOHN HARTNESS BROWN."

Following this request and from May, 1904, to July, 1908, the defendant forwarded to the plaintiff monthly the sum of \$200 in the same form of drafts drawn by the defendant upon the Seaboard National Bank of New York and payable to plaintiff's order. It will be noted that these payments were not made in response to any request on the part of the plaintiff, but entirely upon the request of the husband. The plaintiff testified that her first information that these payments were being made by the defendant instead of by her husband, and that the defendant was advancing taxes on the property, was on February 10, 1908, when she received a written statement showing advances made by the defendant between December 21, 1903, and January 29, 1908, aggregating \$13,070.85. This amount included interest items charged by the defendant and compounded semi-annually amounting to over \$1,300. The defendant continued to make the monthly advancements to plaintiff of \$200 for the months of March, April, May and June, thereby swelling its total advancements, together with interest charged, to \$14,326.80. It appears that during this period when the defendant claims to have made the advancements of the amounts which plaintiff's husband was primarily obligated to pay from 1903 to 1908, plaintiff's husband maintained on deposit with the defendant a considerable sum of money at all times, and that on May 5, 1905, his deposited balance exceeded the total amount which had then been advanced by the defendant under the agreement of June 2, 1899. It does not appear that the defendant made any effort to reimburse itself from said funds of the husband on deposit with it for the advancements which it had thus

made. On June 22, 1908, the defendant wrote the plaintiff as follows: "We have heretofore advanced you certain sums of money, under the provisions of the contract dated June 2nd, 1899, between John H. Brown, Sallie S. Brown and The Cleveland Trust Company, a statement of which advances has been furnished to you. We have requested Mr. Brown to reimburse us for these payments, and have today notified him that unless he reimburses us for the entire amount of our advances on or before August 1st, 1908, we will resort to a sale of the property for that purpose, and to establish a fund for the payment of your annuity of \$2400 as per the conditions of said agreement."

Plaintiff's husband did not reimburse the defendant as it wrote plaintiff it had required, and never paid anything on that account until December 27, 1911, when the advances and charges made by the defendant had amounted to over \$30,000. Notwithstanding this fact, the defendant did not resort to a sale of the property until September 18, 1915, more than seven years after writing the plaintiff as aforesaid and when defendant's claims against the property were more than the proceeds from the foreclosure sale.

The installment payable to the plaintiff on July 1, 1908, was not paid by either Brown or the defendant, nor were said installments paid thereafter down to and including the installment for February, 1909. Plaintiff thereupon commenced an action in the Supreme Court of this State against the defendant, Cleveland Trust Company, to recover at law for the monthly payments due from July, 1908, to February, 1909, inclusive. The complaint in that action was substantially like that in the present action and was based upon the tripartite agreement between the parties of June 2, 1899. The plaintiff in that action alleged the failure of her husband to pay and her demand upon the defendant and its refusal to make payment of the monthly installments aforesaid. The defendant demurred to plaintiff's complaint on the ground that it did not state facts sufficient to constitute a cause of action. Plaintiff then moved for judgment on the pleadings, and her motion was granted by the Special Term in New York county, and judgment in plaintiff's favor and against defendant was entered for \$5,915.50, covering the installments from

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July 1, 1908, to September 1, 1910, together with interest and costs. The defendant appealed to this court from the order overruling its demurrer and granting plaintiff's motion for judgment upon the pleadings. The Special Term was unanimously affirmed by this court. No opinion was written, either at Special Term or in the Appellate Division, but an examination of the record shows that the defendant upon that appeal raised the precise questions that it presents upon this appeal, claiming that it was a mere stakeholder and trustee for the plaintiff under said agreement, and was neither a surety nor a guarantor for the payment of the installments plaintiff's due. This court, in overruling the demurrer and granting plaintiff's motion for judgment on the pleadings, manifestly held that there was a personal obligation on the part of the defendant to pay the installments claimed by the plaintiff, and directed judgment in plaintiff's favor at law for the amount of such installments with interest and costs. (*Brown v. Cleveland Trust Co.*, 139 App. Div. 932.) Defendant did not attempt to further review the decision of this court, but following said decision paid the amount of the judgment, charging against the trust property not only the amount of the arrears so paid and the accrued interest thereon, but also the court costs, counsel fees and all other expenses incurred by it in defending plaintiff's said action. Thereafter the defendant, Cleveland Trust Company, paid the plaintiff \$200 each month down to and including September, 1915, when it ceased to make further payments. Thereupon the plaintiff brought the present action at law to recover the monthly payments which had accrued to the time of the commencement of the present action, together with interest thereon.

The defendant answered herein raising the same issues as those presented upon the first action and seeks to avoid liability in the present action, as it did before, upon the ground that by the tripartite agreement it was merely constituted a stakeholder and trustee for the benefit of the plaintiff, and the trust fund confided to it having been exhausted there is no further obligation on its part to pay the plaintiff the installments mentioned in said agreement.

The case coming on for trial, both parties consented that the jury be excused, and that the case be determined by the

court without a jury, and that the pleadings might be amended in so far as the court found necessary for the disposition of the issues between the parties, either at law or in equity, except there was reserved to the plaintiff the right to sue the defendant in the Ohio courts for neglect of duty. Thereupon the trial court held that the agreement of June 2, 1899, did not constitute the defendant a guarantor of the payment of \$200 a month to the plaintiff, and that it merely constituted the defendant a trustee of the plaintiff and not a guarantor, and thereupon the court directed an accounting on the part of the defendant of its acts as trustee. The defendant filed an account in the action showing that its disbursements and charges in behalf of the trust aggregated \$62,660.62, and that its total receipts were \$55,853.84. The receipts were made up of the proceeds from the sale of the Euclid Heights residential property at foreclosure and moneys paid to the defendant directly by John H. Brown, plaintiff's husband, during the years 1911 to 1914. The expenses with which the trustee credited itself consisted of expense incurred in the first action brought by the plaintiff to secure her monthly installments, the expense of the defendant in the present action, the cost of the foreclosure of defendant's lien upon the property conveyed to it in trust, moneys claimed to have been expended by the defendant with reference to acquiring title to the so-called "barn lot" adjacent to the trust property, advancements made to the plaintiff, including the amount of the judgment awarded her in the first New York action, taxes paid upon the property, insurance, interest on advances made, compounded semi-annually to 1908, and quarterly thereafter, fees of the trustee from 1899 to 1911, compensation of the trustee from 1911 to 1915, and some miscellaneous items. The total amount with which the defendant credited itself being \$62,660.62, as above stated.

To the account thus filed the plaintiff objected, upon the ground that the items with which the trustee had credited itself should not be allowed because had the trustee used due care and diligence in the management of the trust it could have kept the trust fund intact; and, second, that as to items aggregating \$26,606.56 with which the trustee credited itself in such account, the same were improper charges against the

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trust fund. These claimed improper charges consisted of expenses incurred by the trustee in the first New York action, the expenses of the present action, the expenditure in respect to the barn lot, the compound interest items amounting to \$12,821.33, and the compensation charged by the trustee, amounting to \$3,075. The plaintiff asked that the account be surcharged with the difference between the price received for the trust property in 1915, \$34,000, and the amount that would have been received therefor had the trustee performed its duty and sold the property within a reasonable time after it commenced to depreciate in 1907, and that said account also be surcharged with a sum sufficient to offset any credits that might be allowed to the trustee because the trustee could and should have kept the trust fund intact, either by obtaining income from the trust property or by obtaining reimbursement from plaintiff's husband in any one or more of several ways open to it.

By the judgment of the court below, from which both parties have appealed, the court assumed that the \$21,771.48 received from plaintiff's husband directly after the entry of the foreclosure decree in December, 1911, might have been collected from him and applied as accumulated monthly payments to plaintiff and other necessary expenses of the trust becoming due subsequent to December 21, 1903, when the trust company first commenced to make advancements. The court held that had this been done there would have been no unpaid charges against the trust property prior to July 28, 1911, when plaintiff's husband would have defaulted. The court then allowed as a reasonable time within which to take suitable action to protect the plaintiff's interests the defendant should be allowed a year and a half, and from the expiration of said period, January 28, 1913, the court charged the defendant with interest on the \$34,000 received from the sale of the property in 1915 at four per cent, and allowed the defendant to deduct therefrom all advances made by it subsequent to June 28, 1911, excluding, however, from such allowances the amount of the depreciation of the barn lot subsequent to its transfer to the trust company in 1908. Upon this basis the court found that on the date of the entry of judgment herein, November 24, 1919, the defendant should have had in its hands

of said trust funds, \$25,832.57. From this amount the court directed that it pay the plaintiff the arrears due her from October 1, 1915, to June 1, 1919, together with interest amounting to \$9,943.27, and that from the balance the defendant should pay the plaintiff \$200 a month from income and so much of the principal as might be necessary to make such monthly payments until such funds should be exhausted. Both parties appealed from the judgment entered upon such decision by the trial court. The plaintiff's appeal is upon the ground that the trial court improperly held that under the terms of the contract sued upon defendant's liability was not that of a guarantor but merely that of a trustee for the plaintiff, and that even assuming that the contract be construed as one of trust merely for the benefit of the plaintiff, the provision made by the court was inadequate. The defendant appeals from each and every part of the judgment and from the order denying its motion to reopen the trial.

It seems to me that the learned trial court was clearly in error in its construction of the tripartite agreement between the parties.

As I interpret that agreement it provided primarily in consideration of plaintiff's releasing all dower, alimony, claim for support and maintenance, and all other rights accruing to her as the wife of John H. Brown, that the latter agreed to pay to her \$200 per month during the remainder of her life or until she should remarry and in the event of her remarriage that he should pay her during the remainder of her natural life the sum of \$100 per month. This obligation on the part of the husband was the primary office of the agreement. To secure to plaintiff faithful performance on the part of her husband, the defendant agreed that in the event of the husband's failure to pay to the plaintiff the said monthly payments therein by the contract provided, it would, upon demand of the plaintiff, advance to her the said monthly payments. Throughout the agreement the only monthly payments mentioned are those dependent upon and limited by the natural life of the plaintiff. The defendant does not contract to pay these monthly payments so long as the security which it received remained intact, but manifestly by the agreement, without any limitation whatever save the lifetime of the plain-

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tiff, agreed, upon her husband's default and upon her demand, to pay her said monthly installments. I am unable to see how this court, having already construed the contract in question to be that of an absolute guaranty and having affirmed the order of the Special Term granting plaintiff's motion for judgment upon the pleadings in an action at law for the amount of installments due thereon, can, in the present action, wherein the plaintiff asks for the same form of relief as that demanded in the former action, hold otherwise than that the plaintiff is entitled to judgment at law herein. It seems to me this court is bound by its former decision. (*Brown v. Cleveland Trust Co.*, 139 App. Div. 932.) At the time when the case reached this court precisely the same claims were presented as confront us now, and in granting plaintiff's motion for judgment on the pleadings this court necessarily held that there was a personal obligation on the part of the defendant to pay said installments under said contract. Not only that, but the defendant acquiesced in such decision, paid up the amount of the judgment awarded in plaintiff's favor, and thereafter, for the period of five years, without objection or question, continued to pay the plaintiff her said installments. Such action on the part of the parties was a practical construction and interpretation of the contract and was entirely contrary to the present position of the defendant that it was acting simply as a trustee for the plaintiff. As was said in *Insurance Co. v. Dutcher* (95 U. S. 269, 273): "There is no surer way to find out what parties meant than to see what they have done." And in *Nicoll v. Sands* (131 N. Y. 19, 24) it was said: "The practical construction put upon a contract by the parties to it, is sometimes almost conclusive as to its meaning." In *City of New York v. New York City R. Co.* (193 N. Y. 548) it was said: "When the parties to a contract of doubtful meaning, guided by self-interest, enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one." (See, also, *Carthage Tissue Paper Mills v. Village of Carthage*, 200 N. Y. 1, 14.)

For ten years after the execution of said agreement the defendant and all the parties seem not to have considered that

the said defendant was acting as trustee. It was only after the commencement of the action by the plaintiff against the defendant in 1909 that the defendant seems to have evolved the notion that it was acting as trustee for the plaintiff. Originally its books showed that the advancements were made as "Trustee for John H. Brown," but at some time later on were altered by the addition of the words, "and Sallie S. Brown."

Moreover, the instrument itself is replete with evidence that parties at the time regarded the obligation of the defendant as a personal one enduring throughout the lifetime of the plaintiff. It strikes me that so far as the trust agreement was concerned whereby the plaintiff's husband conveyed to the defendant his residential real estate in Cleveland, the transaction was entirely between the husband and the defendant and was merely for the purpose of indemnifying the defendant for any payments which it might be compelled to make to the plaintiff under the terms of the agreement. The plaintiff was in nowise concerned as to any of the details with reference to the security thus held by the defendant. All that the plaintiff was concerned in was that she should receive from some one, either from her husband, who was primarily liable, or from his guarantor, the defendant, her monthly installments during the term of her natural life. The instrument itself uses the words "trust" and "trustee" only in connection with the agreement of plaintiff's husband to indemnify the defendant. The defendant is known in the instrument as an individual and not as a trustee and it executed the instrument in the same manner, and throughout the instrument it appears that it is obligated individually and not as trustee. At no time was the plaintiff given any control over the trust property or the income derived therefrom. The trust was entirely between the defendant and plaintiff's husband, the principal obligor. By the terms of the agreement the plaintiff was in nowise interested in the sale of the property by the trust company, but that was dependent entirely on the consent of plaintiff's husband, upon thirty days' written notice under specified conditions. It is true the agreement provided as a part of the indemnification that plaintiff's husband should pay all taxes and insurance and keep the property in repair, and in default thereof the defendant was authorized

to attend to the same and the expenditures in that behalf were made a lien upon the property conveyed in trust. The agreement contained no provision that the trust company's obligation should cease upon the exhaustion of the security in its hands. Had such been the intention it would have been a reasonable thing to have so provided, and the same could have been accomplished by the use of the simplest language. The agreement was that the defendant should pay on demand to the plaintiff in the event of her husband's default the various monthly installments. I am of the opinion that this clearly bound the defendant as an individual without reference to the sufficiency of any security which it might have seen fit to obtain from plaintiff's husband to indemnify it upon his obligation. (*Taylor v. Davis*, 110 U. S. 330.)

I am, therefore, of the opinion that the learned trial court was in error in holding that defendant was not personally obligated upon the contract in question. I think said contract was clearly one of guaranty whereby the defendant obligated itself in case of the default of plaintiff's husband to pay the various sums which the latter had agreed to pay under the terms of the contract, and that defendant's obligation continued throughout the lifetime of the plaintiff, and did not end with the exhaustion of the security which the husband had given to indemnify the defendant.

All findings of fact contained in the decision of the trial court which are inconsistent with the views above expressed should be disapproved and in the place thereof new findings made in accordance herewith.

The judgment appealed from should be modified so as to award the plaintiff judgment to the amount of all unpaid monthly installments prior to the commencement of the action, together with interest and costs, and as modified affirmed, with costs to the plaintiff of this appeal.

CLARKE, P. J., LAUGHLIN, DOWLING and GREENBAUM, JJ.,
concur.

GREENBAUM, J. (concurring):

I concur. The judgment for \$5,915.50 heretofore entered upon the plaintiff's motion for judgment upon the pleadings

having been affirmed by this court upon appeal and no appeal having been taken to the Court of Appeals from the judgment of affirmance, is a conclusive adjudication of the right of the plaintiff to recover from defendant the sum of \$200 monthly during her lifetime.

Judgment modified as directed in opinion and as so modified affirmed, with costs to plaintiff. Settle order on notice.

SAMUEL STRASBOURGER, as Trustee in Bankruptcy of the Estate of MADERO BROS., INC., Respondent, v. MATILDA LEERBURGER, as Executrix, etc., of HENRY LEERBURGER, Appellant, Impleaded with BENEDICT M. LEERBURGER, Individually, and as Copartners, Carrying on Business under the Firm Name of LEERBURGER BROS., Defendant.

First Department, March 4, 1921.

Sales — action by buyer to recover for breach of contract — failure of buyer to make payment on time constitutes breach.

In an action by the trustee in bankruptcy of a buyer to recover damages for breach of a contract for the sale of quinine, it appeared that on the day when payment was due defendants tendered the merchandise in question as well as delivery of the shipping documents and demanded from plaintiff's representatives in charge of said bankrupt concern the agreed purchase price therefor, net spot cash in New York funds, pursuant to the agreement and agreed to accept a certified check by three o'clock of the day of the demand; that it was necessary to have said check signed by the plaintiff and also by the referee in bankruptcy and that an uncertified check was tendered to the defendants three days thereafter and refused.

Held, on all the evidence, that the breach of the contract was committed by the plaintiff and not by the defendants.

APPEAL by the defendant, Matilda Leerburger, as executrix, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of May, 1920, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 11th day of May, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

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Newborg & Callan [Clarence J. Shearn of counsel; Sidney Newborg and Ralph O. L. Fay with them on the brief], for the appellant.

Irving L. Ernst and *Charles A. Kalish* [Nathan Ballin of counsel], for the respondent.

DOWLING, J.:

This action is brought to recover \$6,000 damages for the breach of a contract made October 18, 1917, between Madero Bros., Inc., and Henry Leerburger and Benedict M. Leerburger, copartners, doing business under the firm name of Leerburger Bros., whereby the latter agreed to sell to Madero Bros., Inc., and Madero Bros., Inc., agreed to buy from them 20,000 ounces of Java sulphate quinine at eighty cents an ounce, C. I. F. New York, terms of payment, net spot cash in New York funds on delivery of documents, shipments to be made in October or November at the option of the seller. Henry Leerburger having died, the defendant Matilda Leerburger was duly appointed executrix under his last will and testament by the surrogate of New York county. On February 18, 1918, a petition in involuntary bankruptcy was filed against Madero Bros., Inc., which was a domestic corporation, in the office of the clerk of the District Court of the United States for the Southern District of New York, and said corporation was thereafter duly adjudicated a bankrupt and the plaintiff, at a meeting of creditors held April 12, 1918, was duly elected as trustee in bankruptcy for said corporation, which election was duly confirmed by the referee in charge, and the plaintiff duly qualified as such trustee and is now so acting. The amended supplemental complaint sets forth further that at the time of the making of the contract in question the merchandise was in Java, Dutch East Indies, and arrived in New York May 1, 1918. It is then alleged:

"*Seventh.* That thereafter and on or about the 3rd day of May, 1918, the plaintiff upon learning of the arrival of the said goods, wares and merchandise in New York, duly offered to pay to the said Henry & Benedict Leerburger the full purchase price of the said goods, wares and merchandise and duly demanded of them the delivery thereof, but they neglected

and refused and have ever since neglected and refused to make delivery of the said goods, wares and merchandise to the plaintiff herein."

It is further alleged that the difference between the market price and the contract price of the goods on May 3, 1918, when the defendants are claimed to have breached their contract, was the sum of \$6,000. It is further alleged:

"*Ninth.* That at all the times mentioned herein, the plaintiff was ready, able and willing to perform the said contract according to its terms and has duly performed each and every term and condition thereof, except as waived and prevented by the said Henry Leerburger."

The answer of the defendants, after certain specific denials, sets up as a first defense that plaintiff, by his acts, conduct, representations and statements waived any neglect or refusal to make delivery of the merchandise in that he, plaintiff, stated to defendants that he would subsequently make a tender of the purchase price of the said goods to them and would then and there demand delivery of the goods and he did thereafter make an alleged tender of the purchase price by tendering an uncertified check in violation of the terms of the contract. For a second defense it is alleged that on May 3, 1918, the defendants, pursuant to the agreement, duly offered and tendered to plaintiff the merchandise in question as well as delivery of the shipping documents and demanded the agreed purchase price net spot cash in New York funds therefor pursuant to the agreement, but plaintiff refused and failed to pay the agreed purchase price to defendants, thereby breaching the agreement.

Upon the trial the following facts appeared: On May 1, 1918, the shipping order for the fifty cases of quinine in question was mailed by Balfour, Williams & Co., the importers, to the defendants and was received by them on May second, at one P. M. On May third one of defendants' attorneys called upon plaintiff's representative in charge of the bankrupt estate of Madero Bros., Inc., and presented a bill for the quinine and asked if they were going to take up the contract, to which the representative, Bonyng, replied in the affirmative. Newborg, defendants' attorney, then said that they would expect a certified check by three o'clock and inquired if

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Bonynge would be able to get it, to which the latter replied: "Well, I will do my best. I have my doubts whether I will be able to do it, because I have first to have the check signed by the trustee in bankruptcy and then have it countersigned by the referee in bankruptcy, and I don't know whether I will be able to do it before three o'clock, but I will do my best." This conversation took place in the office of Madero Bros., Inc., at 100 John street. The plaintiff's office was at 74 Broadway, where he was a practicing attorney. The office of the referee in bankruptcy is at No. 2 Rector street. This conversation between defendants' attorney and plaintiff's representative, who also was an attorney though not then in active practice, resulted in the drawing of the check and its being sent to plaintiff and the office of the referee by Mr. Bonynge at some unspecified time before two o'clock. Although Mr. Bonynge swears the check was drawn on May third, as a matter of fact it bears date May fourth, which was Saturday. At two o'clock on Friday, May third, defendant Benedict Leerburger, accompanied by another of his attorneys, called at the office of the plaintiff and said to Mr. Bonynge: "I understand there is some trouble about getting a check for this quinine." To which Bonynge says he replied: "Not exactly any trouble," and that he explained that he had to have the check first signed by the trustee in bankruptcy and then countersigned by the referee, and that he had so little time he did not know that he would be able to have it all done by three o'clock, and that they were doing their best and the man was then out with the check trying to have it signed. Bonynge says Leerburger then said to him: "Well, we want a certified check * * * by three o'clock" and "if you don't give us a certified check, why your contract will be broken," to which Bonynge replied: "I will do the best I can to get it through by that time." At that time Leerburger had the delivery order for the quinine with him and tendered it to Bonynge and said he would deliver it to his messenger if he had a certified check for him before three o'clock. It will be noted that although Bonynge claims that the check had been already drawn and had been sent to plaintiff and the referee for signature, it did not bear date May third, when the conversation took place, but the following day,

and Bonyngé did not disclose this fact to Leerburger when the demand was made that a certified check should be produced by three o'clock on May third. Bonyngé testified that the check had been given to a messenger to be taken both to the referee and the trustee, but he returned with the information that the referee had left for his country place and would not be back until the following Tuesday; whereupon the check was mailed by special delivery to the referee at his country place. It was received by him there on Saturday, May fourth, between nine and ten A. M., whereupon he countersigned it and either mailed it to New York or brought it down with him on Monday morning, he being unwilling to swear which he did. Bonyngé, however, testified that the check came back by mail about four-thirty Monday afternoon, May sixth, when he went with it to 170 Broadway, defendants' office, and asked for the delivery orders, telling defendants he had the check, which defendants refused, stating the contract was broken. Mr. Benedict Leerburger examining the check said: "Why it is not even certified." Bonyngé said he explained that he had just received it by mail and came around. It was then after banking hours, and he asked if they would take the check if it had been certified, to which Leerburger replied: "No. Your contract is broken. We are not going to deliver the goods." Defendant Leerburger testified that about half-past three on the afternoon of May third an inspection order was asked for these goods, which was refused as quinine is never inspected. When the check was not received defendants wrote to plaintiff that "As you have broken the contract which we had with Madero Bros., Inc., for the sale of 20,000 oz. of sulphate of quinine, we rescind the contract." To this plaintiff replied as follows:

"GENTLEMEN.—Your letter dated May 5th, advising me that you rescind the contract for the sale of 20,000 ozs. of sulphate of quinine received. As I advised you this morning on the telephone I will hold you responsible for any damage occasioned by your refusal to deliver these goods. You were advised yesterday when you called at my office that it would be necessary to obtain the countersignature of the Referee in Bankruptcy to the check in payment for these goods.

"The Referee is out of town and check has been forwarded

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to him and will no doubt be in my hands on Monday at which time same will be delivered to you and I shall expect you to give me a delivery order for these goods. If you then fail to deliver these goods, I shall have proceedings taken to hold you responsible for breach of contract."

The defendant Henry Leerburger was examined in the bankruptcy proceeding on May 9, 1918, and at that time he was asked whether he would accept a check for \$16,000 made by the trustee of Madero Bros., Inc., and countersigned by the referee, to which he answered he would not because he considered they had broken the contract. There was no offer even on May ninth of a certified check for the amount.

I am of the opinion that upon the undisputed facts in this case the breach of this contract was committed by the plaintiff and not by the defendants. The obligation upon the plaintiff under the written agreement of the parties was to pay net spot cash in New York funds on delivery of the documents. Defendants tendered the documents at two o'clock on May third, after having presented a bill and given notice of the arrival of the goods an hour earlier to plaintiff. Defendants were willing to accept a certified check in place of cash and so advised plaintiff through his representative and as the offices of all the parties concerned were within a short distance of each other there is no reason suggested why the certified check was not in fact obtained, save the departure of the referee in bankruptcy to his country home. But the referee was at his office at two o'clock, where he conducted an examination, and did not leave until it was time to take the three-thirty p. m. train from the Grand Central Station. No effort was made to telephone to the referee to arrange to have him sign the check before he left or to learn his whereabouts, so that defendants might be advised if it was impossible to obtain his countersignature by three o'clock. It seems to me very significant as bearing upon the good faith of the efforts made to obtain the signatures in time that the check itself, although drawn on May third it is claimed, bears date on May fourth, and of this no explanation is given.

Upon all the facts it seems clear that the plaintiff had defaulted on this contract by his failure to make payment on May third before the time fixed which, under all the circum-

stances, was a reasonable one. But plaintiff refused to treat the letter of defendants of May third rescinding the contract as effective and wrote that he would deliver the check on Monday and expected delivery orders for the goods then. When the tender of the check was made it was after banking hours on Monday and the check was still uncertified. So that from no viewpoint did this relieve plaintiff from the consequences of his breach. If plaintiff's representative had been more diligent in his efforts to obtain the necessary signatures to the check and had given valid reasons for his failure to obtain them, together with the certification by the bank within the required time, and had then followed these efforts and proof by the tender of a certified check on Monday, a question might have been presented calling for the verdict of the jury. It should be noted as well that although it is alleged in the complaint that plaintiff was at all times ready, able and willing to perform the contract, there is no proof that the bankrupt estate had on deposit with the trust company on which the check was drawn sufficient funds to meet the same either on May third, May fourth or May sixth. Furthermore, plaintiff has failed to prove as further alleged that he has duly performed each and every term and condition of the contract except as waived by Henry Leeburger, but on the contrary his own proof demonstrates that he has failed to perform the essential condition of payment in the manner prescribed by the agreement.

While it may be quite true, as contended by plaintiff, that the defendants took advantage of the situation to rescind this contract because of the increased value of the quinine, the fact remains that they acted within their legal rights, and that the breach was that of the plaintiff and not of the defendants.

The judgment and order appealed from will, therefore, be reversed, with costs to appellant, and the complaint dismissed, with costs.

CLARKE, P. J., LAUGHLIN, MERRELL and GREENBAUM, JJ., concur.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

CHARLES E. SAMPSON and Others, Respondents, v. FRANK F.
PELS COMPANY, Appellant.

First Department, March 4, 1921.

Pleadings — separately stating and numbering causes of action — action to recover purchase price of goods delivered and damages for refusal to accept balance of goods to be delivered — two causes of action stated.

A complaint which alleges the sale of goods to the defendant to be delivered and the delivery of a part of the goods under the contract, and that the defendant failed to pay for a certain part of the goods so delivered and refused to accept the balance that was to be delivered, states a cause of action for the purchase price of the goods delivered and another cause of action for damages for anticipatory breach of contract, and the defendant is entitled to have said causes of action separately stated and numbered.

APPEAL by the defendant, Frank F. Pels Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of February, 1921, denying defendant's motion to compel plaintiffs to separately state and number the causes of action set forth in the complaint.

Diamond, Abrahams & Strauss [*Jerome A. Strauss* of counsel], for the appellant.

Allen R. Memhard [*Mathias L. Connes* of counsel; *Albert Massey* with him on the brief], for the respondents.

DOWLING, J.:

The complaint herein sets forth two causes of action. The first is to recover the sum of \$13,686.43, claimed to be due under a written agreement made between plaintiffs, as agents for the Lily Mill and Power Company, with defendant on or about December 29, 1919, for the sale and delivery to defendant of 10,000 pounds of certain Combed Sea Island cotton yarn, shipments to be made monthly, commencing February 15 to March 1, 1920. The price was fixed at three dollars and twenty-five cents per pound, with a discount of two per cent on the tenth of the month following shipments. It is alleged

that plaintiffs, as such agents, duly performed all of the conditions on their part and on that of their principal to be performed, and "duly delivered to defendant under said agreement and as ordered by it 5,357 pounds of said yarn, which were accepted and paid for, and 3,732 pounds of said yarn, which were accepted but not paid for by defendant — but that defendant, prior to the time appointed for the delivery of the remaining 900 pounds of said yarn, and on or about the 13th day of November, 1920, notified plaintiffs that it would not accept or pay for same, nor carry out the terms of said agreement on its part; that plaintiffs were ready and willing to perform said agreement on their part and would have delivered said remaining 900 pounds of yarn to defendant according to the terms of their said agreement but for defendant's said refusal.

"That thereupon plaintiffs notified defendant that they elected to treat said agreement as abandoned.

"*Fifth.* That by reason of defendant's failure to pay for said 3,732 pounds of yarn and of its failure to accept and pay for said 900 pounds of yarn, plaintiffs have been damaged in the sum of thirteen thousand six hundred and eighty-six and 43/100 (\$13,686.43) dollars, no part of which has been paid."

The second cause of action sets up a written agreement between the same parties for the sale and delivery to defendant of 20,000 pounds of certain Combed Sea Island cotton yarn, to be shipped at the rate of 6,000 or 7,000 pounds a month, beginning in April, 1920, at the price of three dollars and fifty cents per pound with a like discount to that in the first contract.

It is then alleged that plaintiffs duly performed all the conditions on their part and on that of their principal to be performed, and "duly delivered to defendant under said agreement and as ordered by it, 2,165 pounds of said yarn, which were accepted by defendant, but not paid for, but that defendant prior to the time appointed for the delivery of the remaining 17,835 pounds of yarn, and on or about November 13, 1920, notified plaintiffs that it would not accept or pay for same or carry out the terms of said agreement on its part; that plaintiffs were ready and willing to perform said agreement

on their part and would have delivered said remaining 17,835 pounds of yarn to defendant, in accordance with the terms of their said agreement, but for defendant's said refusal.

"*Ninth.* That by reason of defendant's failure to pay for said 2,165 pounds of yarn and of its failure to accept and pay for said 17,835 pounds of yarn, plaintiffs have been damaged in the sum of forty-six thousand seven hundred and nine and 90/100 (\$46,709.90) dollars, no part of which has been paid."

I am of the opinion that in each of these two causes of action, two separate and distinct causes of action are set up: (a) A cause of action for the purchase price of the goods sold and delivered, but for which defendant has failed to make payment as provided by the agreement; (b) a cause of action for an anticipatory breach of the agreement as to the remaining goods still undelivered by plaintiffs, for which they seek to recover damages.

The learned court at Special Term denied the motion because the complaint was concise, clear and simple. But that was not the ground assigned for the motion, which was that each cause of action contained a cause of action for merchandise sold and delivered and another cause of action for a breach of the contract in refusing to accept future deliveries under the contract. The relief asked was that the plaintiffs should be required to separately state and number the separate causes of action set forth in each cause of action alleged in the complaint herein. This criticism of the complaint, for the reasons above assigned, was well grounded and the motion should have been granted. (*Dailey v. Standard Shipbuilding Corporation*, 179 App. Div. 647.)

The order appealed from will be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

CLARKE, P. J., SMITH, PAGE and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

WALTER D. RUSHER, Respondent, v. ANNIE S. WATT and Others, Appellants.

First Department, March 4, 1921.

Principal and agent — action for commissions for securing purchaser for real property who would assume obligations of bond — evidence does not show that defendants agreed to formation of corporation to purchase property.

In an action to recover commissions for securing a purchaser of real estate owned by the defendants it appeared that they were anxious to secure a purchaser who would assume the obligation of a bond which was secured by a mortgage and release them from said liability; that the plaintiff found a man who offered to organize a corporation which would buy the property and assume the obligation of the mortgage, but the mortgagees refused to release the defendants on their bond. On all the evidence, *held*, that the defendants did not agree to or accept the arrangement whereby a corporation was to be formed to purchase said property, and that the plaintiff is not entitled to his commissions.

DOWLING, J., dissents.

APPEAL by the defendants, Annie S. Watt and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of April, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the 13th day of May, 1920, denying defendants' motion to set aside the verdict and for a new trial made upon the minutes.

Benjamin R. Buffett, for the appellants Annie S. Watt and Thomas L. Watt.

Frank S. Gannon, Jr., of counsel [*Parker K. Deane* with him on the brief; *Hill, Lockwood & Redfield*, attorneys], for the appellant Annie W. Keator.

Brisson Howie, for the respondent.

SMITH, J.:

The defendants were obligors upon a bond which is secured by mortgage upon property which they held in common as the heirs of a deceased party. They were worried about their liability for deficiency upon that bond. One Tuttle, who was a friend of the family, was to help them to find a purchaser

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for the property under such conditions as would relieve them from their obligation upon the bond. Tuttle employed this plaintiff as a broker for the purpose of finding that purchaser. The plaintiff did find a man by the name of Fox who agreed to form a corporation, which would buy the property, pay \$10,000 therefor, and assume the mortgage. But the mortgagee refused to release the defendants as obligors upon the bond. Defendants claim they did not come to any final agreement and afterwards the mortgage was foreclosed and the mortgagee bid in the property for the full amount of the mortgage so that the defendants were released from their liability upon the bond. The question is as to whether the parties came to any definite arrangement so as to entitle the plaintiff to his commissions. There is evidence from which it may be found that the plaintiff and the defendant Keator's husband and Thomas Watt, and the husband of one of the other defendants were present at an interview and that they agreed upon the arrangement proposed for the formation of this corporation, the payment of the \$10,000, and that this corporation should assume the payment of the bond and mortgage. One Paskus was the attorney for the Watt heirs generally. There was no evidence that he was authorized to act for them except to consult with Tuttle. Paskus wrote to Tuttle to the effect that the heirs had agreed to that arrangement. Upon the stand, however, he swore that he wrote that upon the assurance of Thomas Watt and one of his sisters, who is not an appellant here and who, I understand, was not served, to the effect that they had so agreed. It is claimed, in the first place, that this letter shows that they had agreed upon that settlement. But the trouble is that that letter is not competent evidence of the fact, because hearsay, and the explanation by Paskus of the writing of the letter shows an agreement simply by Watt and his sister, not appearing here, which would not bind either Mrs. Keator, or the mother, who acted for herself as doweress and as guardian for one of the children. Proof, therefore, is not made by the letter of Paskus, nor by his evidence upon the trial. Plaintiff claims further, that an agreement in behalf of Mrs. Keator is shown by the agreement of Keator, the husband of Mrs. Keator, at this conference. But there is no proof shown

of any authority in Keator to make that agreement in behalf of his wife. Mrs. Keator swears and Keator swears that he had no authority to make that agreement and that he was simply authorized to advise his wife as to the terms proposed by the plaintiff. The proof of authority must rest purely upon the fact that Keator expressed assent. This is not proof of the fact of authority to give that assent, especially in view of the fact that he swears definitely he had no authority, and Mrs. Keator swears that as soon as she heard of the proposal she at once telephoned to Paskus that she would not agree to any proposition that would not release her from the bond. Further, the mother, who represented herself and the infant heir, wrote a letter which was excluded from the evidence, refusing to agree to any such arrangement. That letter was not admitted in evidence on the ground that it was not brought to the plaintiff's attention. But as long as the plaintiff has to prove authority it would seem to negative authority in Paskus to make that agreement. Whether it was competent or not, there is no proof of authority on the part of the mother, either in her own behalf or in behalf of the infant, to agree to these terms, and for lack of authority on the part of Mrs. Keator to her husband to make the agreement it has not been shown by legal proof that the agreement was assented to so as to entitle plaintiff to recover his commissions. Possibly proof was made sufficient to bind the defendant Thomas Watt if he agreed to those terms, were it not apparent from the whole case that his agreement was conditioned upon the agreement of the other heirs and that he did not intend to assume liability for all of this commission at any time. Nor is it shown that he represented to any one that he was authorized by the others to make the agreement in their behalf.

The judgment is unsupported by the evidence and with the order appealed from should be reversed, with costs, and complaint dismissed, with costs to appellant.

CLARKE, P. J., PAGE and GREENBAUM, JJ., concur; DOWLING, J., dissents.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

BENJAMIN GLUCK, Appellant, v. THE BEDFORD CLEANING & DYING CO., INC., Respondent, Impleaded with FRANK WEISS, Defendant.

First Department, March 4, 1921.

Negligence — action against corporation to recover for injuries received while riding in wagon with its president at his request or invitation — authority of president to invite plaintiff to ride — duty of defendant toward plaintiff — complaint improperly dismissed.

In an action against a corporation and its president to recover for personal injuries received by the plaintiff while riding in a wagon with the president, it appeared that the plaintiff had quit the employ of the corporation a few days before the accident and on the day of the accident returned to get his pay check; that while waiting for his check he was asked by the president, as a favor, to get the company's horse and wagon and take it to another place; that the plaintiff did as requested and was met by the president and was then told that he might ride back to the office to get his check, and that on the return trip the accident occurred.

Held, that after the plaintiff delivered the horse and wagon to the president the latter had clear authority either to invite or permit the plaintiff to ride back to the office to which he was required to return to get his pay check.

Whether as an invitee or licensee the corporation defendant owed the plaintiff the duty to use reasonable care not to injure him in driving him back to the office from which he started to do an act in behalf of the corporation, and to which he was required to return.

The complaint should not have been dismissed at the close of the plaintiff's case, for while there was a conflict in the evidence given by his own witnesses and he was required to call the president to prove his case, still the plaintiff may insist that the story he gave was the true one and ask the jury to agree with him.

APPEAL by the plaintiff, Benjamin Gluck, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 25th day of March, 1920, dismissing the complaint at the close of plaintiff's case.

Nathan Kelmenson, for the appellant.

James B. Henney, for the respondent.

SMITH, J.:

The action is brought to recover damages for negligence in the driving of a delivery wagon. The action is brought against

the defendant corporation and its president, who, under the evidence, was driving the wagon at the time of the accident. The president has made default. The corporation defended, and after the close of plaintiff's evidence the complaint was dismissed upon the ground that the plaintiff was riding in the wagon at the invitation of the individual who was the president of the defendant, and not at the invitation of the corporation.

From the evidence it appears that the plaintiff had been an employee of the corporation and left the employment upon the Saturday preceding the Monday, the date of the accident. He was receiving eighteen dollars a week. At the time he received five dollars and there was still due to him thirteen dollars. The regular pay day was Tuesday. He came in Monday morning and asked for the balance of his pay and a check was made out and signed by Weiss, the president. It required, however, the signature of another party who was sick and the check was sent by another employee to the house of this other party for his signature. While the plaintiff was waiting for the return of this messenger he was asked by Weiss, the president of the corporation, to do him a favor and to get the horse and wagon which was used for delivery purposes and take it to the house of a man by the name of Markowitz. He went to the stable and got the horse and wagon and took it to Markowitz' house and there met the defendant Weiss. He then asked Weiss what about his check, and Weiss told him that he might walk down to the office and get it or he might get in the wagon and drive to the office, the wagon first being taken for the purpose of getting some asbestos which was needed at the office. He got into the wagon, Weiss driving. Through the negligence of Weiss in driving the wagon it was thrown against a street car and the plaintiff suffered severe injuries. There is some conflict in the evidence, Weiss swearing that plaintiff had not left the employ of the corporation, in which case his remedy would have been under the Workmen's Compensation Law, and not by action. But the facts as stated are facts which the jury was authorized to find, and under those facts the trial court has held as matter of law that plaintiff was the invitee of Weiss and not of the corporation.

It will be borne in mind that the plaintiff was asked to go for this horse and wagon for the purpose of the business of

the corporation. Weiss swears that he was doing business as a corporation. No particular significance is given to this form of expression. He was the president of the corporation and had undoubted authority to do any act in its behalf incidental to the conduct of its business. It was necessary for the plaintiff after he had done this errand to come back to the office to get the check which was there awaiting his return. He had gone nineteen or twenty blocks in order to get the horse and wagon and at the time Weiss took the rig he was sixteen or seventeen blocks from the office. Having performed this service at the request of the corporation through its president with the necessity of his return to the office in order to get the check for his compensation, it is not reasonable to hold that the invitation of the president to the plaintiff to ride back to the office was in excess of his authority and was not the act of the corporation. The implication of authority to give this invitation would seem to be stronger even than it would be if he had gone for the horse and wagon for compensation and not as a favor to the corporation for which he was not to be compensated. Whether as invitee or a mere licensee, the defendant corporation owed to plaintiff the duty to use reasonable care not to injure him in driving him back to the office from which he started to do an act in behalf of the corporation, and to which he was required to return. Cases are plentiful where a corporation *through its officers* or employees has permitted others to use a passageway across railroad tracks where such corporations have been charged with negligence for the failure of employees to exercise due care to avoid injuring such licensees. A corporation can only consent through its officers. If plaintiff had been injured through the negligence of the corporation's employees while he was getting this horse and before he had delivered him to Weiss, there would not have been the slightest doubt of the corporation's responsibility for the negligence of its servants. After having delivered the horse and wagon to Weiss, the president of the corporation had, as I deem it, clear authority either to invite or permit the plaintiff to ride back to the office to which he was required to return in order to finish up his business with the corporation and receive the balance of the pay that was there awaiting him.

It is true that there is a conflict in the evidence given by the plaintiff's own witnesses. The plaintiff was required to call Weiss himself to prove his case. The plaintiff may insist, however, that the story he has given is the true one, notwithstanding such conflict, and ask the jury to agree with him as to the facts constituting the defendant's liability.

The judgment should, therefore, be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., LAUGHLIN, PAGE and MERRELL, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

GENARO MOLINO, an Infant, by ANTONIO MOLINO, His Guardian ad Litem, Respondent, v. THE CITY OF NEW YORK, Appellant.

First Department, March 4, 1921.

Motor vehicles — action to recover for injuries received by being struck by auto truck — *res gestæ* — evidence of conduct of driver after accident not admissible on question of negligence of defendant — evidence to impeach witness.

In an action to recover for injuries received by a child by being struck by an automobile truck, evidence that as soon as the truck stopped the driver jumped from it and started to run away and was followed for about fifty feet, caught and brought back to the scene of the accident, is not admissible on the question of the defendant's negligence; the acts of the driver were not part of the *res gestæ*.

It seems, that such evidence might have been admissible to impeach the driver if he had first taken the stand and testified as he did after this evidence was received, that he immediately alighted from the auto truck and went back and picked up the child.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of May, 1920, upon the verdict of a jury for \$1,800, and also from an order entered in said clerk's office on the same day denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

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First Department, March, 1931.

Henry J. Shields of counsel [*John F. O'Brien* and *Joseph Beihlf* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellant.

George J. McDonnell of counsel [*McDonnell & Lebett*, attorneys], for the respondent.

LAUGHLIN, J.:

This is an action to recover damages for personal injuries sustained by the plaintiff, who was five years of age, at about one o'clock in the afternoon of August 24, 1918, by being struck and run over by an auto truck in the use of the department of parks, on Mulberry street, opposite No. 58 where he resided with his parents.

The evidence presented a fair question of fact with respect to whether the chauffeur in charge of the auto truck was guilty of negligence and it cannot be said that it clearly preponderated in favor of the plaintiff on that issue. Plaintiff was permitted to show over objections and exceptions duly interposed and taken by the defendant that when the auto truck stopped about fifteen feet after it struck the boy the chauffeur immediately jumped from it and started to run away and was followed a distance of about fifty feet and caught and brought back to the scene of the accident by one of the witnesses for the plaintiff. Appellant claims that the conduct of the chauffeur after bringing the truck to a stop was not part of the *res gestæ* and that the reception of the evidence constituted, in effect, an admission on the part of the chauffeur after the accident that he had been guilty of negligence, which was the essential fact upon which alone the liability of the defendant could be predicated. It is perfectly well settled that the arrest of a servant, upon whose conduct negligence is predicated, immediately after an accident or the declaration of the servant after the event does not constitute a part of the *res gestæ* and that evidence thereof is incompetent. (*Luby v. Hudson River R. R. Co.*, 17 N. Y. 131; *Whitaker v. Eighth Avenue R. R. Co.*, 51 id. 295; *Butler v. Manhattan R. Co.*, 143 id. 417; *Brauer v. New York City Interborough R. Co.*, 131 App. Div. 682; *Maisels v. Dry Dock, E. B. & B. St. R. R.*, 16 id. 391; *Seipp v. Dry Dock, E. B. & B. R. R. Co.*, 45 id. 489. See, also,

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Norris v. Interurban St. R. Co., 90 N. Y. Supp. 460; *Boltan v. Barrett*, 172 id. 457; *Vassar v. Knickerbocker Ice Co.*, 17 id. 182.) We are of opinion that on the sharp issue of fact arising on the competent evidence in the case with respect to the negligence of the defendant, it was prejudicial error to show the action of the chauffeur after the accident tending to show that he was at fault. We do not wish to be understood as holding that this evidence or part of it might not have been admissible if the chauffeur had first taken the stand and testified, as he did after this evidence was received, that he immediately alighted from the auto truck and went back and picked up the child; but its reception in that event would have been justified only on the theory that it tended to impeach his testimony and, if requested, it would have been the duty of the court to instruct the jury that it could not be deemed evidence of an admission of negligence as against the defendant. Here, however, it was received only as evidence of the defendant's negligence. If it had not been received, the chauffeur might not have been questioned on direct examination concerning what occurred after the accident and the door might not have been opened for any of this evidence by way of impeachment.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

LEO K. STUPPEL, Respondent, v. ANNIE RABINOWITZ,
Appellant.

First Department, March 4, 1921.

Parent and child — contract by mother to pay, from money to be received for injuries to child, value of services in securing settlement — contract not enforceable where mother not guardian.

A contract by a mother, who was not her child's general guardian, to pay, from moneys to be received from a third person for injuries inflicted on her child, a stated compensation for services in procuring a settlement, is not enforceable.

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First Department, March, 1921.

APPEAL by the defendant, Annie Rabinowitz, from an order and determination of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of the county of New York on or about the 24th day of June, 1920, affirming a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of the plaintiff.

Samuel Dickstein, for the appellant.

Nathan April, for the respondent.

LAUGHLIN, J.:

The pleadings were oral. Plaintiff complained for work, labor and services performed at the request of the defendant in procuring the settlement of an accident claim; and the answer was a general denial. The uncontroverted evidence shows that in the month of August, 1919, defendant's son, who was twenty years of age, sustained personal injuries from a collision between his automobile, in which he was riding, and another automobile owned by one Simon, and that the defendant and her son claimed that the accident was caused by the negligence of Simon; that the claim was placed in the hands of Mr. Baker, an attorney at Hurleyville, N. Y., who communicated with Simon, by letter, concerning the accident and prepared an application for the appointment of a guardian for the infant; that in the month of November or December the claim was taken out of his hands either with a view to having the plaintiff endeavor to make an adjustment of it as he claims or to having it placed in the hands of Mr. Goldstein, a New York attorney, as claimed by the defendant; that a tentative settlement for \$1,025 was negotiated by the plaintiff and the infant with the Ocean Accident Insurance Company, which had issued an accident policy to Simon, but the representatives of the insurance company on ascertaining that the claimant was an infant, required that guardianship papers be made out, and thereupon defendant employed an attorney and was appointed general guardian and received from the insurance company \$1,025 as such guardian in settlement of the infant's claims for damages to his automobile and for personal injuries.

The plaintiff was a paint salesman and the infant was in

his employ. He testified that some three or four months after the claim had been placed in the hands of attorney Baker, the infant informed him about it and shortly thereafter he stated to the defendant that he had had a similar case with an insurance company and advised that the matter be taken up directly with the insurance company; that the defendant replied that she intended to take the case out of the hands of the attorney and would then take it up with the insurance company; that he offered to go to the insurance company for her and try and get a settlement and asked what she would be satisfied with, to which she replied that if she got \$700 she would pay all that she received over that amount to him; that a few days later, at defendant's request, he was present at an interview between her and attorney Baker in the city of New York and she requested him in Jewish to ask Mr. Baker to return the papers, and he did, and that Mr. Baker said that nothing had been done and he was satisfied to return the papers, and at the instance of the defendant Mr. Baker was requested to return the papers to the plaintiff; that later on he and the infant called on Mr. Baker at Hurleyville and obtained the papers and took them to the defendant, who told him to retain them and see what he could do with respect to obtaining a settlement of the claim, whereupon he asked her what there would be in it for him and she said she would pay him all that he received in settlement over \$700; that he and the infant interviewed Simon, obtained certain pictures of the accident, which occurred in Hohokus, N. J., had numerous interviews with Mr. Brown, the head claim agent of the insurance company, and with Mr. Denny, one of its adjusters, and obtained offers of settlement from them, which were reported to the defendant; that after receiving one of \$600 which defendant agreed to take and from which he would get nothing, he and the infant had further negotiations with Denny and Brown and finally obtained an offer of \$1,025 and reported it to the defendant and made an appointment with her to go to an attorney to obtain guardianship papers; that she failed to keep the appointment and thereafter charged him with attempting to swindle her; that he subsequently ascertained that she had been appointed guardian of the infant and that the claim had been adjusted and the payment made to her as guardian.

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The plaintiff's wife and brother testified to admissions made by the defendant that she had agreed to pay plaintiff for his services all he received in settlement over \$700. The testimony of the defendant and of the infant was to the effect that there was no agreement for the payment of compensation to the plaintiff and that as a friend and employer of the infant he volunteered to accompany the infant and assist in negotiating the settlement; and the infant testified that the settlement was negotiated by him personally, thus accompanied by the plaintiff.

It is unnecessary to consider the point as to whether the services claimed to have been performed by the plaintiff constituted practicing law for which he was not licensed, for the contract, if made as claimed by the plaintiff, was to pay him part of the money belonging to the infant, and the defendant as the mother of the infant, without having been appointed his general guardian, could make no contract to dispose of his property. It may be that the defendant could have obligated herself personally by an original promise to pay plaintiff for such services rendered in behalf of the infant but she did not undertake so to do. The plaintiff made out a *prima facie* case of *employment* by the defendant, but he presented no evidence with respect to the value of his services; and the only promise he claims defendant made to pay for his services was out of the amount received for the benefit of the infant in settlement of the claim, but since, when the agreement, if any, was made, she had no authority to contract for the infant, such an agreement would be unenforcible.

It follows that the determination of the Appellate Term should be reversed, with costs, and the judgment of the Municipal Court reversed and the complaint dismissed, with costs.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Determination and judgment reversed, with costs in this court and in the Appellate Term, and complaint dismissed, with costs.

ALFRED H. NEWBURGER and Others, Appellants, v. SOL D. LEVINSON, Respondent.

First Department, March 4, 1921.

Contracts — action by stockbrokers to recover balance due on marginal account — rights of broker where customer repudiates order to sell stock short — erroneous charge.

In an action by a firm of stockbrokers to recover a balance due on a marginal account it appeared on the part of the plaintiff that the defendant gave an order to sell 100 shares of stock short and on the next day gave an order to sell another 100 shares of the same stock short; that they gave defendant notice of said sales; that the plaintiffs demanded at different times that the defendant cover the deficit in his account and that they later, after notice, purchased 200 shares, at an advance, to cover the short sales. The defendant contended that the second order given was one to purchase to cover the first order to sell; that upon receiving notice of a deficit he saw plaintiffs, discovered their mistake, and repudiated the transaction. No evidence of the daily course of the market after the defendant was notified of the deficit was introduced but there was an incidental reference to the price on one day.

Held, that it was error for the court to so charge the jury that the verdict for the defendant may have been rendered, not on the theory that the second order was one to purchase, but on the erroneous theory that the plaintiffs should have purchased before they did and at a price which would have left a credit balance on their books in favor of defendant.

The plaintiffs had the right to accept defendant's repudiation and to take for their own account the repudiated but authorized transaction, and to purchase to cover for their own account without notice to the defendant, but in that case they would have been obliged to give the defendant the benefit of the second order as though they had promptly executed it as an order to purchase.

If the plaintiffs were right in their contention that both orders were to sell then it was not their duty, after the defendant had repudiated the second order, to use reasonable efforts to reduce the loss, but they had the right to continue to carry the account till the defendant gave them an order to purchase to cover the short sale, and they had the right to call on the defendant for further margin, and on his failure to comply they were within their rights in purchasing the stock at the market, at the time and place specified in the notice, to cover the short sales.

APPEAL by the plaintiffs, Alfred H. Newburger and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York

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on the 22d day of January, 1920, on the verdict of a jury, and also from an order entered in said clerk's office on the 23d day of January, 1920, denying plaintiffs' motion for a new trial made upon the minutes.

Osmond K. Fraenkel of counsel [*Louis Werner*, attorney], for the appellants.

David Vorhaus of counsel [*House, Grossman & Vorhaus*, attorneys], for the respondent.

LAUGHLIN, J.:

The action is brought by a firm of stockbrokers against a customer to recover \$4,576.35, an alleged balance of a marginal account. The complaint set forth an account between the parties commencing on the 23d of July, 1919, and continuing until the tenth of October of that year; but the plaintiffs, recognizing that the controversy between them and their customer was over the execution of an order given by him on the 29th of August, 1919, which he claimed involved an order given the day before, omitted from the accounts two items relating to the execution of orders on August twenty-eighth and twenty-ninth, and alleged their claims with respect thereto separately as follows: That on the twenty-eighth of August, at the request of the defendant, they sold 100 shares of American Sumatra Tobacco short at seventy-eight and one-half per share and that on the next day they sold another 100 shares of the same stock short on the defendant's order at eighty-two and three-eighths per share. The giving and execution of the first of those orders were admitted, but the giving and execution of the other were denied, and the defendant alleged that it was an order to buy to cover the short sale made the day before, and he testified that the plaintiffs reported to him verbally the same day that it was so executed at the price at which they, instead, made the short sale.

If the order given on August twenty-ninth was to purchase to cover the prior short sale, as claimed by the defendant, he would have had a credit balance with the plaintiffs and they would have no cause of action against him; but if, on the other hand, it was an order to sell short, then the brokers would have been carrying for him sales of 200 shares short,

and there would be a balance owing to them, as they claimed, provided they were entitled to charge the account of the defendant with the amount they paid on the eighth of October thereafter to purchase to cover the two short sales. The plaintiffs alleged and gave evidence tending to show that they gave the defendant due notice in writing of the execution of the disputed order as a short sale; but he denied that he received any notice with respect to the execution of that order other than a verbal notice that they had executed it as an order to purchase. Plaintiffs also alleged and showed that they duly notified defendant in writing on the sixth of October that, on the opening of the market on the eighth, they would purchase to cover the two short sales unless before that time he furnished them with stock to cover said sales, and that he failed so to do, and that at the time specified they purchased 100 shares at $110\frac{1}{2}$ and the other 100 shares at 111, and charged his account with the purchase price and commissions. Defendant admitted the receipt of that notice, but he disregarded it, on the theory that the order of August twenty-ninth was to purchase; and he denied responsibility for the purchases so made by the plaintiffs on the eighth of October. Prior to giving the notice of sale, the plaintiffs on September seventeenth notified the defendant in writing by mail that his account showed a deficit and that they required a cash payment of \$4,000. He testified that he received that notice and called on the plaintiffs the next day and protested that there must be some error, and then for the first time discovered that they claimed that he was short those 200 shares, which he denied and insisted that he had only sold 100 shares short and that he covered it the next day. On the twenty-fourth of September, and on the third of October, the plaintiffs again in writing by mail demanded further margin, which was not furnished, and on the sixth of October they gave the defendant the notice in due form, pursuant to which they purchased the 200 shares on the eighth of October to cover the two short sales.

These were the only issues presented by the pleadings or by the evidence. No evidence of the daily course of the market after the dispute arose between the parties on the eighteenth of September concerning the order of August twenty-ninth was introduced by either party, and there was only an incidental

reference in the testimony with respect to the market price on one day between the eighteenth of September, when the dispute arose, and the time plaintiffs purchased the 200 shares on the eighth of October. That testimony was given by the defendant in relating a conversation at the office of the plaintiffs on September twenty-fifth between him and the plaintiff Lester Newburger, in which Newburger reiterated the claim that he was short 200 shares and he insisted that he was not. He was then asked how high and how low the stock had sold between August twenty-ninth and September seventeenth, and he said that it had been as low as eighty-three and had been up around ninety-two; and later on in testifying concerning the same interview, but without having been asked about the market price of the stock, he said, "Sumatra that day was around about 85 and then it had gone down a little," and that he told Newburger that if he was short 200 shares, his account did not warrant the plaintiffs in carrying it and that it was strange, inasmuch as they knew nothing of his financial condition and this was a dangerous stock, since it moved sometimes from fifteen to twenty points, that they carried the account two weeks without letting him know. After so testifying and in giving the same conversation, he said that he told Newburger that the plaintiffs might cover to protect themselves if they wanted to but that he had nothing to do with the transaction and did not assume any responsibility; and that at the time he was there in the plaintiffs' office talking with Newburger, he remembered distinctly that the stock was selling at ninety and one-half or ninety-one.

The court in submitting the case to the jury first instructed them that if the order of August twenty-ninth was to buy to cover the short sale of the twenty-eighth, there could be no recovery; and if it was to sell, plaintiffs were entitled to recover the amount claimed. These instructions properly presented the issues arising on the pleadings which were the only issues on which the evidence afforded a basis for a verdict; but thereupon the court, without any request on the subject from either party, charged that even though the order of August twenty-ninth was for a short sale as claimed by the plaintiffs, still it was for the jury to determine whether or not plaintiffs, knowing that defendant had repudiated the short sale of

August twenty-ninth, acted properly in waiting from September seventeenth until October eighth, and then buying for the account of the defendant and charging him the difference, and instructed the jury that if plaintiffs acted in good faith and with reason, defendant could not complain, but that if they waited too long and the delay was improper and not in the interest of the defendant, then they ought to find for the defendant. Counsel for the plaintiffs duly excepted to those instructions and to the court's leaving any question of good faith or reasonableness of time or of the action of the plaintiffs to the jury. Thereupon, without waiving his exceptions, counsel for the plaintiffs asked the court to charge that if the jury were to be permitted to consider these matters, their verdict should not be for the defendant but should be for the plaintiffs, on the basis of what it would have cost them to purchase to cover within a reasonable time after defendant denied that the order of August twenty-ninth was to sell. To that the court replied: "I would charge that, if there was any evidence * * * as to what the market rate was between September 17th and October 8th;" whereupon counsel for the defendant said that there was such evidence and that the defendant had testified that the stock sold as low as eighty-six during that time. Counsel for the plaintiffs denied that, and the court, without having the testimony read, disposed of the matter by saying: "I will charge as you request, if that evidence is in the case." Counsel for the plaintiffs requested the court to have the jury render a special verdict on this new issue, but the request was refused and an exception was taken. It may be that a new trial might have been avoided if the court had yielded to that request; but in the state of the record, the verdict may have been rendered for the defendant, not on the theory that the order of August twenty-ninth was an order to purchase, but on the erroneous theory that the plaintiffs should have purchased before October eighth and that they could have so purchased at eighty-five or eighty-six, which concededly would have left a credit balance in favor of the defendant.

The court further charged that even if the order of August twenty-ninth was to sell, plaintiffs could only charge defendant's account with the market value at the time of the repudia-

tion by the defendant or within a reasonable time thereafter, and an exception thereto was taken by the plaintiffs. The court gave other similar instructions on the question of reasonable time and again instructed the jury that, even though the order of August twenty-ninth was to sell, it was the duty of the plaintiffs when the defendant repudiated it to use reasonable efforts to reduce the loss, and plaintiffs duly excepted thereto.

If the theory of the court with reference to its being the duty of the plaintiffs to use reasonable efforts to reduce the loss, even though they were right and defendant was wrong with respect to the order of August twenty-ninth, was not erroneous, still the verdict could not stand for there is no evidence that the plaintiffs could have purchased to cover at any time after September seventeenth at a price which would have left a credit balance in favor of the defendant; and, therefore, even on that theory, the plaintiffs would have been entitled to recover, at least, on the basis of the market price of ninety-and one-half or ninety-one on September twenty-fifth, which was the only definite evidence with respect to the market price after September eighteenth when the dispute arose; for it is perfectly plain that the testimony first given by the defendant with respect to Sumatra selling at eighty-five could not have referred to the time of the interview, because he made it clear later on that at that time the stock was selling at ninety and one-half or ninety-one, and, therefore, it does not appear to what date he referred in specifying eighty-five as the price. But the theory of the court was erroneous. The court evidently had in mind the rule applicable to the conversion of stock by an unauthorized sale by brokers. (*Baker v. Drake*, 53 N. Y. 211.) Here, however, there was no conversion. On the theory that the brokers executed the order as given, it was a short sale and the customer did not have the stock, and, therefore, it could not be converted. (*Campbell v. Wright*, 118 N. Y. 594.) If the brokers did not execute the order as given, the customer, of course, had the right to repudiate their action and to insist that he be given the benefit of the order as if properly executed (*Levy v. Loeb*, 89 N. Y. 386); but if they executed the order as given by the defendant, he was not warranted in repudiating the sale, and they were not

called upon to take any action *in his behalf* upon his erroneously claiming that the order was to purchase, and they had a perfect right, if, so far as they were concerned, they were willing to take the risk, to continue to carry the account until the defendant gave an order to purchase to cover, which he did not do; and they also had a right to accept his repudiation and to take for their own account the repudiated but authorized transaction and to purchase to cover for their own account without notice to the defendant; but in that event they would have been obliged to give him the benefit of the transaction according to his claim with respect to the order, that is to give him the benefit of the order as if they had promptly executed it as an order to purchase, and they would also have had the right to refuse to recognize his erroneous claim and to continue to carry the transaction as a short sale until he withdrew his erroneous claim and gave them an order to purchase to cover, or directed them to do so without prejudice to his claim that they had improperly executed his order; and on that theory they were at liberty, as they did, to call upon him for further margin or for the stock, and on his failure to comply with such demand and on proper notice, they were within their rights in purchasing the stock at the market, at the time and place specified in the notice, to cover the short sales. (*Campbell v. Wright, supra*; *White v. Smith*, 54 N. Y. 522; *Gruman v. Smith*, 81 id. 25; *Allen v. McConihe*, 124 id. 342; *Rogers v. Wiley*, 131 id. 527; *Policastro v. Sprague Co.*, 175 App. Div. 417; *Birnbaum v. May*, 58 id. 76; *Minor v. Beveridge*, 141 N. Y. 399, 403; *Baker v. Drake*, 53 id. 211; *McIntyre v. Whitney*, 139 App. Div. 557; *affd.*, 201 N. Y. 526; *Cohen v. Rothschild*, 182 App. Div. 408, 417, 418. See, also, *Hurt v. Miller*, 120 App. Div. 833; *affd.*, 190 N. Y. 553.)

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellants to abide the event.

CLARKE, P. J., DOWLING, MERRELL and GREENBAUM, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellants to abide event.

KATHERINE P. CONLON, as Administratrix, etc., of WILLIAM J. BOYHAN, Deceased, Plaintiff, v. UNION DIME SAVINGS BANK, Defendant.

First Department, February 4, 1921.

Descent and distribution — distribution of personal property of married woman dying intestate leaving husband and no descendants controlled by common law — entire estate vests in husband — administration not necessary — bank deposit transferred to husband as administrator passes to his administrator after his death — Decedent Estate Law, § 103, applied.

The law of distribution of the personal property of a married woman, who dies intestate leaving her a husband surviving and no descendants, is not controlled by any statute of this State but by the common law, under which her entire personal estate is vested in her husband by virtue of his marital rights.

It seems, that where the husband may readily obtain possession of his deceased wife's personalty, he may do so without the formality of being appointed administrator of her estate.

In the instant case the husband, the plaintiff's intestate, having taken out letters of administration upon the estate, and having obtained possession of the moneys left on deposit with the defendant by having the account changed to read "Estate of Mary C. Boyhan, dec'd., Wm. J. Boyhan, admr.," he was, at the time of his death, the absolute owner in possession of the fund, all debts of the wife having been paid, and said fund passed to his administrator to whom the defendant must pay it rather than to an administrator *de bonis non* of the wife.

The form of the deposit does not change the fact of the exclusive ownership in the husband at the time of his death.

That the plaintiff is the only proper person to collect the moneys on deposit with the defendant is also evident from section 103 of the Decedent Estate Law which provides that where the husband dies without having taken out letters of administration on his wife's estate, "leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband."

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Louis Kunen of counsel [*Robert Godson*, attorney], for the plaintiff.

Frederick C. Tanner of counsel [*Morris E. Kinnan* with him on the brief; *Butcher, Tanner & Foster*, attorneys], for the defendant.

GREENBAUM, J.:

The agreed statement of facts shows that Mary C. Boyhan, a resident of Suffolk county, N. Y., died on July 6, 1918, intestate, without leaving any descendants her surviving and leaving surviving her husband, William J. Boyhan, since deceased, and a sister, Katie A. McClellan, who resides in Rochester, N. Y.; that at the time of her death she was the owner of account No. 423280 with the defendant, the Union Dime Savings Bank, upon which the balance then was \$1,093.33; that on October 11, 1918, letters of administration upon her estate were issued by the surrogate of Suffolk county to her husband who duly qualified as such administrator and thereafter had the account in the Union Dime Savings Bank changed to read: "Estate of Mary C. Boyhan, dec'd., Wm. J. Boyhan, admr.;" that the funeral expenses and all of the debts of Mary C. Boyhan have been paid; that William J. Boyhan withdrew \$200 from the account in question on December 9, 1918; that no other withdrawals or deposits have been made and that the present balance of the account is \$964.56.

It also appears that William J. Boyhan died on April 11, 1919, intestate, a resident of Suffolk county, N. Y. On May 23, 1919, letters of administration upon his estate were duly issued by the surrogate of Suffolk county to Katherine P. Conlon, the plaintiff in this action, who has duly qualified and is acting as such administratrix; that the plaintiff as administratrix has presented to the defendant the pass book of account No. 423280 and has filed with it a certificate of the issuance to her of letters of administration upon the estate of William J. Boyhan and the waiver of the attorney for the Comptroller of the State of New York in the Matter of the Estate of William J. Boyhan, deceased, consenting to the transfer of this account, and has demanded that the money on deposit in the account in question be turned over

to her as the administratrix of William J. Boyhan, deceased, and that the defendant refuses to pay the money on deposit to this plaintiff.

The controversy submitted for the decision of this court is whether or not upon the agreed statement of facts the plaintiff is entitled to judgment against the defendant for the money on deposit with it under account No. 423280 in the form above described, including accrued interest, or whether the defendant is only obliged to pay over the money on deposit with interest to an administrator *de bonis non* of the estate of Mary C. Boyhan.

The law of distribution of the personal property of a married woman, who dies intestate leaving a husband her surviving and no descendants, is not controlled by any statute of this State but by the common law, under which her entire personal estate is vested in her husband by virtue of his marital rights. (*Olmsted v. Keyes*, 85 N. Y. 593; *Robins v. McClure*, 100 id. 328; *Gerber v. State Bank*, 167 App. Div. 263; *Matter of Thomas*, 33 Misc. Rep. 729.)

The foregoing cases state the law that where the husband may readily obtain possession of his deceased wife's personalty, he may do so without the formality of being appointed as administrator of her estate. And in the language of the opinion in the *Gerber Case* (*supra*): "If administration is needed to reduce the choses to possession, he is entitled to it, and if there are no debts the administration is solely for his benefit."

In the instant case the husband of the deceased, Mary C. Boyhan, had taken out letters of administration upon her estate. He thereafter obtained actual possession of the moneys left on deposit by her with the defendant by having the account changed in the form above described. Being vested with the legal ownership of the property and having obtained possession of it through administration before death, he was the absolute owner in possession of the entire fund, all debts of his wife having been paid.

The form of deposit does not change the fact of its exclusive ownership in the husband at the time of his decease. In *Gittings v. Russel* (114 App. Div. 405, 407, 408) the husband of a deceased wife, leaving no descendants, was appointed

administrator of her estate. As in the present case he caused a bank account which was in his wife's name to be transferred to him as such administrator in the precise form as here appears. This court held that the account in the name of the husband, as administrator, was subject to attachment by a judgment creditor, the opinion stating: "It is undoubtedly the rule of the common law, which exists in this State, that where a married woman, possessed of separate personal estate, dies without having made disposition of it during her lifetime or by way of testamentary appointment, the title thereto vests in the surviving husband and cannot be affected by the granting of administration upon her estate. (*Robins v. McClure*, 100 N. Y. 333, and case cited.) It seems that under the case cited, the money on deposit belonged *jure mariti* to the defendant. While it may have been within the reach of creditors and subject to debts of the decedent, the right to his deceased wife's personal property was in the defendant. But there were no debts of the wife, and it is immaterial whether the nominal title was in him individually or as administrator (*Robins v. McClure*, *supra*) so far as ownership is concerned. We are of the opinion that the money on deposit in the trust company belonged to the defendant, or if the mere relation of debtor and creditor existed, as in the ordinary case of a depositor with a bank, that then the debt of the trust company to the depositor was in law one owing to the defendant."

That the plaintiff is the only proper person to collect the moneys on deposit with the defendant under discussion is also evident from section 103 of the Decedent Estate Law (as amd. by Laws of 1909, chap. 240) which is as follows: "If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor. A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband."

The concluding paragraph of section 103 is a practical

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recognition of the existence of the common law, which vests the entire personal property of a wife in her surviving husband *jure mariti* where she dies intestate without descendants and is an express statutory authority in favor of the plaintiff in declaring that where a husband dies leaving assets of his deceased wife unadministered, "they pass to his executors or administrators as part of his personal property." (*Feit v. Holzapfel*, 104 Misc. Rep. 73.)

In *Matter of Thomas (supra)* it was held under somewhat similar circumstances that the administrator of the husband and not of the deceased wife was the proper person to collect moneys on deposit belonging to the wife.

Judgment for the plaintiff and, under the stipulation, without costs.

CLARKE, P. J., LAUGHLIN, DOWLING and PAGE, JJ., concur.

Judgment ordered for plaintiff, without costs. Settle order on notice.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ANNIE NASSOIT, Respondent, v. WILLIAM YOUNG, Justice of the Municipal Court of the City of New York and Any Judge or Justice Holding or to Hold Any Term of the Municipal Court, City of New York, Borough of Manhattan, Fifth District, and WALTER K. HIRSCHBACH, Appellants.

First Department, February 4, 1921.

Courts — rule 35 of Municipal Court of City of New York providing for trial of rent cases in district where property situate is invalid — prohibition not proper remedy to prevent enforcement of rule.

Rule 35 of the Municipal Court of the City of New York, providing that all actions for rent or for the rental value of the use or occupation of premises used for dwelling purposes and all actions for damages sustained through the holding over of the occupant shall be brought in the district within which the premises are situate, is invalid as violative of section 17 of the Municipal Court Code.

The power of the Municipal Court under section 17 of the Municipal Court Code to designate a part of the court where special classes of cases shall be brought or tried applies only to the establishment of parts of the court

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in each district and does not authorize the justices to abrogate the provisions of said Code and to require the bringing of a certain class of actions in a district other than that in which the Code provides that an action must be brought.

A writ of prohibition is not the proper remedy, where the court is about to dismiss the complaint in compliance with the provisions of said invalid rule, but if the Municipal Court should grant the motion to dismiss, the proper remedy is by appeal, for the court had jurisdiction of the parties, and while its threatened action, if effectuated, would have been erroneous, it was not in excess of its jurisdiction.

GREENBAUM, J., dissents.

APPEAL by the defendants, William Young and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of December, 1920, granting relator's motion for an alternative writ of prohibition.

John P. O'Brien, Corporation Counsel [*John F. O'Brien* of counsel; *Russell Lord Tarbox* and *David E. Hurwitz* with him on the brief], for the appellants.

Francis M. Scott of counsel [*Leo C. Stern* with him on the brief; *McLaughlin & Stern*, attorneys], for the respondent.

DOWLING, J.:

This appeal is taken from an order of Special Term directing that an alternative writ of prohibition issue commanding the defendants to desist and refrain from any further proceedings on the motion to dismiss the complaint in the action brought by Annie Nassoit against Walter K. Hirschbach now pending in the Municipal Court of the City of New York, Borough of Manhattan, Fifth District, for the reason that the same was not brought in the proper district, and from taking any proceedings on said motion until the further direction of this court at Special Term, and ordering said defendants to show cause at said Special Term why they should not be absolutely restrained from any further proceedings on the motion made by the defendant to dismiss the complaint in the said action.

Annie Nassoit brought an action against Walter K. Hirschbach in the Municipal Court of the City of New York, Borough of Manhattan, Fifth District, to recover rent due on December 1, 1920, amounting to the sum of fifty-five dollars.

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Said Annie Nassoit is a resident of the said fifth district. Under the New York City Municipal Court Code (Laws of 1915, chap. 279, § 17) it is provided that "An action must be brought in a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action may be brought in any district." Annie Nassoit properly brought her action in the fifth district pursuant to the provisions of this section of the Municipal Court Code. It appears, however, that the justices of the Municipal Court of the City of New York have adopted a rule as follows:

"Rule 35. All actions for rent or for the rental value of the use or occupation of premises used for dwelling purposes and all actions for damages alleged to have been sustained through the holding over of the occupant of such premises after the expiration of his term shall be brought in the district within which the premises are situated. Whenever a failure to comply with this rule shall appear, the court shall upon its own motion or upon motion of the defendant, dismiss the complaint, with costs, to be taxed by the clerk, unless the defendant by stipulation in writing to be filed with the clerk or in open court, consents that the action remain and be tried in the district wherein the same has been brought."

The property, to recover rent for which the action is brought, is situated in the seventh district, and the defendant Hirschbach made affidavit setting forth said fact and asking that the action for rent be dismissed, with costs, or that the same be removed to the seventh district court and that plaintiff pay the costs of the application. One of the attorneys for Annie Nassoit made affidavit setting forth that the justice presiding at Trial Term, Part 1 of the Municipal Court, Fifth District, would grant the motion and dismiss the complaint, as had been done by the other justices of the said Municipal Court in every instance where it was made to appear that the action was brought in a district other than that prescribed by said rule, they in each case having dismissed the complaint, with costs.

I am of the opinion that the justices of the Municipal Court of the City of New York were without power to make rule 35, which is in direct contravention of the legislative

mandate contained in section 17 of the Municipal Court Code. The power given to the Municipal Court justices under section 8 of the Municipal Court Code to adopt and amend rules, subject to the approval of the presiding justices of the Appellate Divisions of the Supreme Court for the first and second departments, or of the justices presiding therein, does not authorize them to establish a rule which is in violation of the legislative act. The power to designate a part of the court where special classes of cases shall be brought or tried applies only to the establishment of parts of the court in each district and does not authorize the justices to abrogate the provisions of the Municipal Court Code and to require the bringing of a certain class of actions in a district other than that in which the said Code provides that an action must be brought. My conclusion is that rule 35, as adopted by the justices of the Municipal Court, is without force or effect and is invalid, as being in direct contravention of the legislative provision.

I am of the opinion, however, as well that the writ of prohibition is not the proper remedy in this case, but that if the Municipal Court justice should grant the motion to dismiss, the proper remedy is by appeal. The writ of prohibition against a court or other tribunal possessing judicial powers can only issue where it is without jurisdiction or is proceeding or threatening to proceed in excess of its jurisdiction. (*People ex rel. Newton v. Special Term, Part 1*, 193 App. Div. 463.) In this case the court had jurisdiction of the parties and while its threatened action, if effectuated, would have been erroneous, it was not in excess of its jurisdiction but an error which was the subject of appeal. Although the appellants express their desire, in their brief, to waive any irregularity of practice in order to secure an expression of this court's opinion on the merits, the question of the power to issue the writ is one which cannot be waived and the court must, therefore, reverse the order upon that ground.

The order appealed from is reversed, with ten dollars costs and disbursements, and the motion for an alternative writ of prohibition is denied, without costs.

CLARKE, P. J., LAUGHLIN and PAGE, JJ., concur;
GREENBAUM, J., dissents.

CLARKE, P. J. (concurring):

When the committee of the board of Municipal Court justices presented to the presiding justice for his approval the rule under consideration, which had been unanimously adopted by said justices, it was represented to him that there existed a most extraordinary condition in the Municipal Courts. That they were crowded to the point of breaking down with rent cases; that there was great excitement; that in view of the conditions existing in regard to housing, the Legislature had passed emergency legislation of the most drastic character, and that the board felt it was its duty to do everything possible to allay agitation, excitement and unrest; that one of the matters complained of was that tenants were often required to appear in districts where landlords resided and far from their own homes and friends; that as the Municipal Court was one court, though sitting in different districts, in considering section 17 of the Municipal Court Code which authorized the board of justices to designate "a part or parts of the court where special classes of cases shall be brought or tried," it was reasonable to construe the words "a part or parts of the court" as including districts, and that as cases affecting title to real estate were properly brought where the real estate was situated, it was proper by analogy to treat rent cases in the same manner; that in their opinion the proposed rule would considerably allay the existing excitement and aid in preventing violent disturbances. With considerable doubt—even without adverse argument, but mainly moved by the *argumentum ad hominem* indicated *supra*—the rule was approved. As it is now challenged, with an opportunity for careful consideration, and after argument, I concur with my brethren in the conclusion that the rule is not warranted by the Municipal Court Code and does violence to the provisions thereof.

Order reversed, with ten dollars costs and disbursements, and motion denied, without costs.

In the Matter of the Election of Directors of the BOULEVARD
THEATRE AND REALTY COMPANY.

BOULEVARD THEATRE AND REALTY COMPANY and
ALEXANDER H. PINCUS, Appellants; OSCAR L. GRAF,
Respondent.

First Department, February 4, 1921.

Corporations — provision in certificate of incorporation that directors can be elected only by unanimous consent of stockholders is invalid — Stock Corporation Law, § 25, construed and applied.

A provision in a certificate of incorporation of a stock corporation that the directors can only be elected upon the unanimous consent of all the stockholders is violative of the provision of section 25 of the Stock Corporation Law that "directors of every stock corporation shall be chosen * * * by a plurality of the votes at such election;" the wording of said section justifies an interpretation that it is mandatory.

To permit a certificate of incorporation to contain a provision requiring a unanimous vote of all the stockholders would be a violation of the common-law rule as well. It would also be contrary to public policy since it may work a fraud upon the public who may purchase such shares in ignorance of the provision.

DOWLING, J., dissents.

APPEAL by the Boulevard Theatre and Realty Company and another from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of July, 1920, setting aside an election of directors pursuant to provisions of section 32 of the General Corporation Law.

Abr. A. Silberberg of counsel [*Charles Meyers*, attorney], for the appellants.

Harry Baer, for the respondent.

GREENBAUM, J.:

On June 4, 1920, a meeting of the stockholders of the Boulevard Theatre and Realty Company was held for the purpose of electing three directors. All of the outstanding stock of

the company amounting to 2,000 shares was represented at the meeting either in person or by proxy. Morris L. Goldstone and Louis Pincus each received 2,000 votes; Alexander H. Pincus 1,550 and Oscar L. Graf, the respondent, received 450 votes. It was thereupon announced that Morris L. Goldstone, Louis Pincus and Alexander H. Pincus were elected as directors. The petitioner, Oscar L. Graf, contends that the election was not in conformity with paragraph "Seventh" of the certificate of incorporation of the Boulevard Theatre and Realty Company and hence invalid.

The certificate of incorporation of the company, which was organized in 1912 under the laws of this State, contains the following provision: "*Seventh.* The number of directors of said corporation shall be three, and the said directors and the number thereof shall not be changed except by the unanimous consent of all the stockholders of said corporation." The 8th paragraph of the certificate states the names and the post office addresses of the three directors of the said corporation for the first year.

The appellant maintains that the words "said directors" in paragraph "Seventh" of the certificate refers to the directors named in paragraph "Eighth" thereof. The respondent claims that they refer to directors whenever elected, that is to say, that no directors may be elected except upon the unanimous consent of all the stockholders of the corporation. Since two of those who were voted for as directors received the unanimous vote of all the stockholders, it is difficult to understand why the election as to them was set aside.

It is our opinion that the provision in the certificate of incorporation that a director can only be elected upon the unanimous consent of all of the stockholders is violative of section 25 of the Stock Corporation Law, which declares that "directors of every stock corporation shall be chosen at the time and place fixed by the by-laws of the corporation by a plurality of the votes at such election." (See, also, Laws of 1918, chap. 267, amdg. said § 25.)

The wording of section 25 justifies an interpretation that is mandatory. It expressly refers to "every stock corporation." The auxiliary verb "shall" appearing therein is primarily a word of command. As used in statutes that

word is generally mandatory. Of course, it may be used in a connection which would justify stripping it of its ordinarily imperative character so as "to mean 'may' when no right or benefit to any one depends on its imperative use." (35 Cyc. 1451, 1452.)

"Where a statute declares a thing *shall* be done, the natural and proper meaning is that a peremptory mandate is enjoined." (2 Bouvier Law Dict. [Rawle's Rev.] 991.)

Words should be given the ordinary popular meaning unless some good reason to the contrary is shown. (1 Kent Comm. [14th ed.] 462; 2 id. 555.)

No reason has been advanced for giving to the direct unqualified language of section 25 a meaning other than that which it would ordinarily import.

This court has held in its recent decision in *Matter of Keogh, Inc.* (192 App. Div. 624) that a provision in a by-law of a stock corporation that the number of stockholders necessary at annual meetings to constitute a quorum for the election of directors "shall consist of the majority of the stock represented in person or by proxy," was invalid, being in conflict with section 25 (*supra*).

The same ruling was made in *Matter of Rapid Transit Ferry Co.* (15 App. Div. 530). The effect of both of these decisions is that section 25 (*supra*) is mandatory.

In *Reiss v. Levy* (175 App. Div. 938) the court held that "the defendants could not make a valid agreement that the directors should be elected by a vote other than prescribed by the Stock Corporation Law (Laws of 1909, chap. 61, § 25, constituting chapter 59 of the Consolidated Laws), which prescribes a plurality of the votes at such election to be sufficient."

It is true that the foregoing cases had reference to by-laws and not to provisions embodied in a certificate of incorporation. But the reasoning of those cases is likewise applicable to a certificate of incorporation.

In Cook on Corporations (Vol. 2 [7th ed.], p. 1843) it is said: "A provision in a certificate of incorporation that directors named therein shall continue until they become incapacitated, resign or die, is void and does not prevent an election."

Respondent relies upon *Ripin v. U. S. Woven Label Co.*

(205 N. Y. 442). In that case the action was brought to restrain an attempt to increase the number of the directors of the United States Woven Label Company in violation of a provision in its certificate of incorporation that its number of directors shall be four and that "said number shall not be changed, except by the unanimous consent of all the stockholders of said corporation." The action related to the "number of directors" and not to an election of directors. It involved the construction of section 26 of the Stock Corporation Law (as amd. by Laws of 1909, chap. 421) and not of section 25.

The Court of Appeals held that the provision just quoted was not in conflict with section 26 of the Stock Corporation Law which prescribed that "the number of directors of any stock corporation *may* be increased or reduced * * * when the stockholders owning a majority of the stock of the corporation shall so determine," etc., inasmuch as section 10 of the General Corporation Law provided that "the certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligation or the performance of any duty imposed by law." The court held that the unanimity clause as to changing the number of directors in the certificate of incorporation was valid, since it constituted a limitation of the powers of the corporation and of the stockholders. It must be borne in mind that in that case the court was construing section 26, a permissive statute, which states that the "number of directors * * * *may* be increased," etc. In the instant case we are dealing with a section couched in imperative language. It says, "Directors of every stock corporation *shall* be chosen * * * by a plurality of the votes at such election."

In *People ex rel. Browne v. Koenig* (133 App. Div. 756) this court, in holding that a certificate of incorporation may contain a provision denying the rights to preferred stockholders to vote for directors, stated (at p. 758): "Unless expressly forbidden by statute, the articles of incorporation may divide the stock into common and preferred, and may provide that the

preferred stockholders shall be deprived of voting power in consideration of the preference over the common stock which is given them. Such a provision is but an arrangement between two classes of stockholders which does not concern the public and does not violate any rule of the common law or any rule of public policy." But section 25 is an enactment of the common-law rule.

To quote from *Matter of Rapid Transit Ferry Co.* (*supra*, 532): "At common law 'such of the shareholders as actually assemble at a properly convened meeting constitute a quorum for the transaction of business, and a majority of that quorum have authority to represent the corporation.'" (Citing *Morawetz Corp.* § 476; 2 Kent Comm. *293; *Field v. Field*, 9 Wend. 394.)

To permit a certificate to contain a provision requiring a unanimous vote of all the stockholders to change a director would thus be a violation of the common-law rule, reinforced as it is by statute. It would also be contrary to public policy since it may work a fraud upon the public who may purchase such shares in ignorance of the certificate provisions in question.

Indeed, in the instant case, it appears that from an original capitalization of \$20,000 the capital stock was increased to \$200,000 and that many of the holders of the increased stock submitted affidavits that they were not aware until this controversy arose that there was any provision in the certificate of incorporation requiring a unanimous vote to elect directors.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN and PAGE, JJ., concur; DOWLING, J., dissents upon the authority of *Ripin v. U. S. Woven Label Co.* (205 N. Y. 442).

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

In the Matter of the Application of PALMER & PIERCE, INC., a New York Corporation, for an Order Directing that a Dispute between PALMER & PIERCE, INC., the Petitioner Herein, and the PRODUCERS MERCANTILE CORPORATION, Arising out of a Contract Entered into September 24, 1920, Providing for the Arbitration of Disputes as to Quality of Delivery Be Submitted to Arbitration in Pursuance of Chapter 275 of the Laws of 1920.

PRODUCERS MERCANTILE CORPORATION, Appellant; PALMER & PIERCE, INC., Respondent.

First Department, February 4, 1921.

Arbitration — breach of warranty in sale of fruit — arbitration agreement in margin of broker's note of confirmation of sale — issue whether marginal reference to arbitration was part of contract should be summarily tried — subordinate issue whether provision for arbitration "in usual manner" meant before arbitration committee of Dried Fruit Association or under statute.

A sale of fruit was evidenced by the food broker's note of confirmation in duplicate, a carbon copy being given to each of the parties. On the margin of the note there was the following clause: "Any dispute arising as to the quality of delivery on this contract to be arbitrated in the usual manner." On a motion by the buyer to compel arbitration the seller raised the question that the arbitration clause was not a part of the contract.

Held, that in the absence of testimony the court could not decide that question on the petition and answer and that the seller was entitled to a summary trial thereof.

Further, if it is found that the clause is a part of the contract it will be necessary to determine whether the clause providing for arbitration "in the usual manner" refers to arbitration before the board of arbitration of the Dried Fruit Association of New York, which settles many disputes of the nature of the one involved, or to arbitration pursuant to the laws of this State.

APPEAL by Producers Mercantile Corporation from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of December, 1920, directing the parties to submit to the arbitration of a controversy existing between them and appointing an arbitrator in accordance with

sections 2 and 3 of the Arbitration Law (Consol. Laws, chap. 72; Laws of 1920, chap. 275).

There is no question of constitutionality of the Arbitration Law raised on this appeal.

Alexander Holtzoff of counsel [*Paul Windels* with him on the brief; *Percival S. Jones*, attorney], for the appellant.

Gustave A. Teitelbaum of counsel [*Louis Jaykowsky* with him on the brief; *Teitelbaum & Jaykowsky*, attorneys], for the respondent.

GREENBAUM, J.:

The petitioner, Palmer & Pierce, Inc., and the Producers Mercantile Corporation, the appellant, are wholesale dealers in produce. On or about September 24, 1920, Palmer & Pierce, Inc., duly purchased from the Producers Mercantile Corporation 1,300 boxes of currants through the medium of a firm of food brokers. The sale was evidenced by the brokers' note of confirmation in duplicate, a carbon copy thereof being given to each of the parties. On the margin of the note appears the following clause: "Any dispute arising as to the quality of delivery on this contract to be arbitrated in the usual manner."

The petition sets forth the contract between the parties and the payment to the appellant of \$14,356.25 in accordance with the terms thereof and alleges that thereafter it was discovered that the goods delivered to the petitioner were "contrary in quality and condition to the fruit" which had been purchased under the contract; that notice of the defective condition was given to the seller, who paid no attention thereto; that petitioner made repeated demands for arbitration of the matters complained of in accordance with the provisions of the contract in that regard, and that the appellant refused to arbitrate.

The appellant interposed an answering affidavit to the petition, denying some of the allegations in the petition affecting the merits of the petitioner's claim, which cannot here be considered, and alleged that the arbitration clause appearing on the margin of the contract was not a part of the contract, and that at the time that the sale was discussed

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with the brokers "nothing was said about arbitrating any disputes that might arise between the parties to said sale."

There was thus a material issue presented as to whether the marginal reference to an arbitration was a part of the contract. The learned justice who heard the application for an order to enforce arbitration held upon the papers before him that the arbitration clause was a part of the contract. It is, however, evident that, in the absence of testimony, the court was not in a position judicially to pass upon the question of fact raised by the petition and answer thereto. It may be that upon the trial it will be found that the appellant was ignorant of the marginal reference to arbitration, and that the broker, although authorized to sign the memorandum notes, was not empowered by trade usage or expressly to include an arbitration clause in the memorandum. The Arbitration Law provides for just such a contingency in section 3 thereof which *inter alia* reads as follows: "If the making of the contract or submission * * * be in issue, the court, or the judge thereof, shall proceed summarily to the trial thereof."

It also appears from the answering affidavit that the Dried Fruit Association of New York is an "association of merchants organized for the betterment and improvement of trade relations of merchants and has to that end established a board of arbitration wherein disputes regarding quality are frequently determined between members and non-members. This medium of arbitration and its facilities are almost uniformly resorted to by food merchants generally in this city." Should it be decided that the arbitration clause was a part of the contract, it is evident that it would also become necessary to interpret the meaning in the arbitration clause of the words "in the usual manner." This may require the taking of testimony. If it be found that the "usual manner" to arbitrate in the dried fruit trade was under the board of arbitration of the Dried Fruit Association of New York, it would be incumbent upon the court to direct an arbitration accordingly.

Under the circumstances we are constrained to reverse the order entered, with ten dollars costs and disbursements, and to direct a summary trial of the issue as to whether or not a

contract of arbitration was entered into between the parties and, if so, of the further issue, whether the arbitration agreed upon was one to be conducted by the board of arbitration of the Dried Fruit Association of New York, or pursuant to the laws of this State.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and a summary trial directed as stated in opinion. Settle order on notice.

ANNA DOMB, Respondent, v. LOUIS DOMB, Appellant.

First Department, February 4, 1921.

Husband and wife — separation — abandonment — decree in favor of wife not granted where wife deserts husband without justification — alimony and counsel fees denied.

The undisputed facts disclose, not an abandonment on the part of the husband, but a refusal on the wife's part, without legal justification, to live with her husband.

An abandonment which entitles a spouse to a decree of separation must be one which contemplates a voluntary separation of one party from the other without justification, with the intention of not returning.

A wife is not entitled to alimony *pendente lite* and counsel fees where she fails to present to the court any evidence that there is a reasonable ground for commencing the action and that there is a reasonable probability that she will succeed.

APPEAL by the defendant, Louis Domb, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of December, 1920, granting plaintiff alimony *pendente lite* at the rate of \$35 per week and counsel fee of \$150.

Louis S. Schwartz of counsel [Max D. Steuer, attorney], for the appellant.

Nathan Burkan, for the respondent.

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First Department, February, 1921.

GREENBAUM, J.:

The action is brought for a separation on the alleged ground that the defendant abandoned the plaintiff and failed to support her.

The parties were married on August 22, 1920. Thereafter they took up their abode at a hotel in Arverne, L. I., with the intention of remaining there for a few weeks. On September eighteenth they looked for apartments in the city of New York, on which occasion a quarrel arose between them because defendant, according to plaintiff's version, would not hire any of the apartments which the plaintiff preferred because he thought that they were either too expensive or too far uptown. As a result of the quarrel, the plaintiff refused to return to Arverne with her husband. He nevertheless returned to the hotel every evening at the usual hour until September twenty-fourth. Owing to the fact that he could not get in touch with his wife and that the hotel was shortly to close he packed up his belongings and returned to the city. On September twenty-fifth her counsel wrote to the defendant threatening him with legal proceedings unless he provided her with a habitation suitable to their station in life and he incidentally referred to the fact that defendant had deserted his wife. Defendant caused a reply to be sent to plaintiff's attorney stating that there was no necessity for legal proceedings as "this is probably the first little trouble they have had" and further explaining that owing to the existing housing conditions there was difficulty in readily securing a suitable apartment at a reasonable rental. The letter closed with the request for his wife's address. No reply having been received to this letter, another letter was written on October ninth to plaintiff's attorney stating that defendant was desirous of having his wife return and that he would provide her with a house suitable to their station in life. The reply to that letter was the commencement of this action on October fourteenth.

The undisputed facts disclose, not an abandonment on the part of the defendant, but a refusal on the plaintiff's part to live with her husband. There was no legal justification on the part of the plaintiff to refuse to return to their hotel on account of the happenings of September eighteenth. If every

quarrel or misunderstanding between married couples would constitute a legal ground for separation, then enough courts to adjust such marital disturbances could not be provided.

Without expressing an opinion as to which of the parties provoked the quarrel, it is in all likelihood the fact that both spoke and acted rashly and imprudently and that their differences would have been eventually composed by the exercise of mutual forbearance. There is no reason to suppose that the parties cannot amicably resume their marital relations.

In any event, the case is barren of any facts which would justify the court in finding that there was any fixed intention on the part of the defendant to abandon his wife. An abandonment which entitles a party to a decree of separation must be one which contemplates a "voluntary separation of one party from the other without justification, with the intention of not returning." (*Williams v. Williams*, 130 N. Y. 193; *Simon v. Simon*, 6 App. Div. 469; *affd.*, 159 N. Y. 549; *Heyman v. Heyman*, 119 App. Div. 182.)

The force of the rule in *Williams v. Williams* (*supra*) was recognized in the *Heyman Case* (*supra*) in which reference was also made to the familiar rule that "where a wife brings an action for separation in order to entitle her to an order for the payment of alimony she must present to the court some evidence tending to show that there is reasonable ground for her commencing the action and that there is reasonable probability that she will succeed in establishing her charges."

There is no probability of plaintiff's success in establishing her charges upon the facts before us.

The order directing payment of counsel fee and alimony is reversed and plaintiff's motion for alimony and counsel fee is denied, without costs.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order reversed and motion denied, without costs.

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First Department, February, 1921.

FRANKEN-KARCH CORPORATION, Appellant, v. ALEXANDER CASTRIOTIS and CHRYSANTHOS KONTOS, Doing Business as A. C. CASTRIOTIS-KONTOS Co., Respondents.

First Department, February 4, 1921.

Joint adventures — agreement construed to be of character of joint adventure — suit in equity for accounting properly brought.

An agreement, under which the plaintiff was to contribute his time and give the benefit of his experience in the matter of the sales of goat skins and the defendants were to purchase the skins, and the net profits of the transactions were to be divided equally between the parties, and an accounting as to each transaction at the close thereof was to be rendered by the defendants to the plaintiff and such sums as were due the plaintiff from the defendants were to be paid to the plaintiff, is an agreement for a joint adventure.

Accordingly the plaintiff had the right to proceed in equity for an accounting.

APPEAL by the plaintiff, Franken-Karch Corporation, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of September, 1920, denying plaintiff's motion for judgment upon the pleadings, consisting of an amended complaint and a demurrer interposed thereto, on the ground that it was insufficient in law.

Paul Charles Werner, for the appellant.

Lawrence E. Brown of counsel [*Bullowa & Bullowa*, attorneys], for the respondents.

GREENBAUM, J.:

The material allegations of the complaint are as follows:

"*Second.* That on or about the fifteenth day of April, 1919, it was agreed between the plaintiff and defendants, who were in the business of exporting and importing general merchandise, that in consideration of plaintiff's examination of the various shipments of hides and skins which should be received thereafter by the defendants as well as the plaintiff's advice as to conditions governing the hide market and the proper and most advantageous sources as to where such hides and skins

might be sold and disposed of, and, whenever possible and most advantageous in consideration of the plaintiff's own efforts to dispose of said various hides and skins, that the difference between the consigned value and the value which any hides and skins consigned to the defendants might be sold for, after deducting expenses, would be equally divided between the plaintiff and defendants; it was furthermore agreed that no hides or skins shipped to the defendants would be sold by them without the plaintiff's consent; it was furthermore agreed by and between the parties, that the above mentioned agreement was terminable at any time at the option of either party and it was further agreed that an accounting as to each transaction at the close thereof would be rendered by the defendant to the plaintiff, and such sums as were due the plaintiff from the defendants would be paid to the plaintiff."

The complaint further alleges that four distinct and separate sales involving in the aggregate 180 bales of "Ghezani goat-skins" were made, some by plaintiff and others by defendants, and that "pursuant to the terms of the agreement" the aforesaid goat skins were duly examined by the plaintiff, and defendants were duly advised by the plaintiff as to the market conditions governing the sales of these skins.

After alleging due performance of all the conditions to be performed and the demand for rendition of an account as to the several transactions above mentioned, plaintiff prays for an accounting. The action is framed solely in equity. The learned justice at Special Term construed the agreement set forth in the complaint as one for compensation for services to be measured by the profits resulting from the transactions in question, for which a recovery may only be had in an action at law. If the agreement justified that construction, the demurrer was properly sustained.

It seems to me that the agreement was of the character of a joint venture, the subject-matter whereof was the interest of the parties in the profits as such. The plaintiff was to contribute his time and give the benefit of his experience in the matter of sales and the defendants were to purchase the goods which were the subject of the sales. If there were no profits the plaintiff would lose the time devoted to and the expense incurred in the enterprise.

In a sense the plaintiff's services were to be measured by half of the profits, if there were any. Reference to reported cases touching the question under discussion is of scant benefit, since in the final analysis the facts of each case must determine whether the relationship subsisting between the parties was that of employer and employee or principal and broker, who was to be compensated for his services to be measured by the profits of the transactions, or whether it was a joint venture. That the parties regarded the arrangement as a joint venture is emphasized by the provision of the agreement which reads: "that an accounting as to each transaction at the close thereof would be rendered by the defendant to the plaintiff, and such sums as were due the plaintiff from the defendant would be paid to the plaintiff."

The order should be reversed, with ten dollars costs and disbursements, and plaintiff's motion for judgment on the pleadings is granted, with ten dollars costs, with leave to defendants to withdraw the demurrer and to answer within twenty days after notice of entry of the order herein upon the payment of costs and disbursements allowed upon this appeal and ten dollars costs of motion.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to defendants to withdraw demurrer and to answer on payment of said costs.

CHARLES REED, Appellant, v. SADIE EDWARDS REED,
Respondent.

Third Department, February 28, 1921.

**Husband and wife — annulment of marriage on ground of insanity
— sane spouse cannot maintain action.**

The sane party to a marriage contract cannot maintain an action against his insane spouse to annul the marriage on the ground of insanity.

APPEAL by the plaintiff, Charles Reed, from a judgment of the Supreme Court in favor of the defendant, entered in

the office of the clerk of the county of Albany on the 10th day of February, 1919, dismissing the complaint on a motion made upon the pleadings at the opening of the trial, on the ground that the same did not state facts sufficient to constitute a cause of action.

Arthur Helme, for the appellant.

Earl Barkhuff, for the respondent.

H. T. KELLOGG, J.:

This is an appeal from a judgment sustaining a demurrer to a complaint. The complaint is very brief. It alleges that the parties to the action were married on the 11th day of November, 1914; that at the time of the marriage the defendant was a lunatic; that defendant has continued ever since to be insane; that she is now confined in a State hospital for the insane; that the parties have not lived together since the 18th of December, 1914; that there were no issue of the marriage. It is not alleged that the plaintiff was ignorant of the lunacy of the defendant at the time of the marriage, or that any fraud was practiced to conceal from him that fact. The simple question is presented: Can the sane party to a marriage contract maintain an action against his insane spouse to annul the marriage on the ground of insanity? The Code of Civil Procedure provides in section 1743 that an action to annul a marriage may be maintained on the ground of the non-age of a party, the invalidity of the marriage, the idiocy or lunacy of a party, the procurement of the marriage by force, duress or fraud, the physical incapacity of a party, or the relationship of the parties within prohibited degrees. It specifically provides that if infancy be the ground the action may be maintained only on behalf of the infant. (§ 1744.) It specifically provides that either party may bring the action on the ground of the invalidity of the marriage. (§ 1745.) It fails to specify which party may sue in case of the relationship of the parties within prohibited degrees. From this it may be assumed that in such case an action will lie in favor of either party. As to the three remaining grounds for annulment it provides that an action will lie on behalf of the idiot or lunatic, in favor of the defrauded or injured

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party, and in favor of the capable against the incapable party, or, if the incapable party were married when unaware of his incapacity, then in favor of either party. Clearly a party who procures a marriage by fraud or a party who marries knowing that he is incapable ought not to be permitted to avoid the marriage, the one for his fraud or the other for his incapacity. Neither of them, however, is expressly debarred from bringing suit. The sane party to a marriage with an insane person is under the statute in a precisely similar situation. He is neither given nor expressly denied a right to maintain an action. We think that the Legislature in expressly naming the particular parties who might bring suit for annulment intended thereby to exclude all other persons from rights of action. Accordingly, we hold that a sane party to a marriage with an insane party may not bring suit to avoid it on the ground of insanity. It is clearly for the public good that this should be the law. Otherwise a man knowingly marrying an insane woman might, after cohabitation, discard her at will. We think that the demurrer was properly sustained.

The judgment should be affirmed.

All concur, KILEY, J., with a memorandum, in which WOODWARD, J., concurs.

KILEY, J. (concurring):

This is an appeal from a judgment dismissing plaintiff's complaint upon the ground that it does not state facts sufficient to constitute a cause of action. Mr. Justice H. T. KELLOGG writes sustaining the judgment. I concur in the result, but find ground for my exception in the following rule laid down in the opinion, viz.: "Accordingly, we hold that a sane party to a marriage with an insane party may not bring suit to avoid it on the ground of insanity." In the abstract this is correct; that is, the insanity alone does not furnish ground for a cause of action, but to hold or seem to hold that any sane party may not, under any circumstance, maintain an action for annulment of marriage against an insane party does not seem to me tenable. Section 10 of the Domestic Relations Law defines marriage as a civil contract. Section 7 of the Domestic Relations Law provides that "Actions to

annul a void or voidable marriage may be brought only as provided in the Code of Civil Procedure." This contemplates only the procedure to be followed. Section 1750 of the Code of Civil Procedure, so far as pertinent here, provides: "An action to annul a marriage, on the ground that the consent of one of the parties thereto was obtained by force, duress, or fraud, may be maintained, at any time, by the party whose consent was so obtained." This right to either party, and the jurisdiction of the court to hear such action and render judgment therein, exist, independent of the provisions of statute. (*Fisk v. Fisk*, 6 App. Div. 432.) Any contract may be avoided for fraud if the party defrauded does not confirm the contract after the fraud is discovered by him. The waiver of the fraud may be effected in a variety of ways. Had the complaint alleged that defendant was insane at the time of the marriage and such fact was fraudulently concealed from plaintiff; that deception was practiced upon him in concealing defendant's mental condition, and by such deception he was led to enter into such contract, and that he had not confirmed nor waived the fraud, the action could be maintained. The complaint does not contain such allegation, and, therefore, does not state facts sufficient to constitute a cause of action.

WOODWARD, J., concurs.

Judgment affirmed, with costs.

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Appellant,
v. PAVILION NATURAL GAS COMPANY, Respondent.

Third Department, February 28, 1921.

Gas and electricity — franchise fixing maximum rates for gas — power of Legislature to change rates — powers of Public Service Commission — change above maximum cannot be made by company by giving notice to Public Service Commission and publication — Public Service Commissions Law, section 66, subdivisions 5 and 12, construed.

A stipulation in a franchise granted by a village to a gas company, fixing the maximum price which it will charge for gas furnished to the inhabitants of a village is a contract, but it is subject to the police power of the

State and may be modified for the public welfare, and the Legislature has conferred this power on the Public Service Commission.

Subdivision 12 of section 66 of the Public Service Commissions Law does not authorize a gas company to change its rates above the maximum prescribed by its franchise by giving thirty days' notice to the Public Service Commission and by publication for thirty days. Said subdivision applies to cases where a maximum rate is not fixed by the franchise contract or where the change is within the maximum, but where there is a maximum rate fixed in the franchise and the proposed rate exceeds it, subdivision 5 of section 66 applies.

KILEY, J., dissents, with opinion.

APPEAL by the plaintiff, Public Service Commission, Second District, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Albany on the 27th day of May, 1920, upon the decision of the court, rendered after an inquiry at the Albany Special Term into the facts and circumstances as required by section 74 of the Public Service Commissions Law, dismissing plaintiff's petition upon the merits.

Ledyard P. Hale, for the appellant.

James M. E. O'Grady, for the respondent.

VAN KIRK, J.:

A stipulation in a franchise granted by a village to a gas company, fixing the maximum price which it will charge for gas furnished to the inhabitants of the village, is a contract; but it is a contract which is subject to the police power of the State and may be modified for the public welfare. The exercise of this power rests in the Legislature, which may confer the exercise of the power upon the Public Service Commission. The Legislature has conferred this power upon the Public Service Commission. (Pub. Serv. Comm. Law, § 66, subd. 5; Id. § 72;* *People ex rel. Village of South Glens Falls v. P. S. Comm.*, 225 N. Y. 216, 223.) In this case the Public Service Commission has not exercised its power and the power has not been otherwise delegated by the Legislature than to the Public Service Commission.

The delegation of this power must be distinct and express. Subdivision 12 of section 66 of the Public Service Commis-

* Since amd. by Laws of 1920, chap. 542.—[REP.]

sions Law* grants power to require every gas company to file its rates and charges made, and provides how such charges may be changed, but it does not purport to give the gas company power to change its franchise contract by simply giving thirty days' notice to the Commission and by publication for thirty days to the public. This would empower the gas company to change its rate by default and not under the police power of the Legislature, exercised directly or indirectly. It seems a perfectly consistent construction of the statute, giving effect to all its parts, to hold that subdivision 12 applies to cases where a maximum rate, for gas to be furnished to inhabitants of the village, is not fixed by the franchise contract, or where the proposed change is within the maximum rate; and that, where there is a franchise contract fixing such maximum rate, and the proposed rate exceeds it, subdivision 5 applies; otherwise one party to the contract would be authorized to change that contract without distinct and express authority from the Legislature. (*Town of North Hempstead v. Pub. Serv. Corp.*, 193 App. Div. 224.)

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

All concur, except KILEY, J., dissenting, with an opinion.

KILEY, J. (dissenting):

The defendant, respondent, herein is a domestic corporation, organized in November, 1905. It owns and operates a gas plant in the counties of Genesee and Livingston, N. Y. From the meager record before us I think we may infer that its principal business office is at Pavilion, N. Y. Since its incorporation it has been procuring and distributing natural gas in the locality where it is now operating. Different rates prevail in the different towns and villages in which its gas is distributed. The distribution of this gas to the consumer is permitted by a franchise from the several towns and villages, granted upon an agreement, on the part of respondent, incorporated in the franchise, that the maximum rate charged for gas per 1,000 cubic feet should not exceed the amount named in the franchise. In August, 1919, respondent, as petitioner,

* Since amd. by Laws of 1920, chap. 542.—[REp.]

filed its petition with the Public Service Commission, Second District, for permission to increase its rates to consumers to an amount in excess of the rates fixed by the agreement in the franchise; no evidence was taken; some negative direction was given by the Commission, which proceeding was found by the court at Special Term upon the hearing herein had not to have conferred jurisdiction upon the Commission to make any order fixing rates; that there was no evidence upon which the Commission could legally act, or base a finding and whatever it did in that regard was of no binding force. With that finding I fully agree. An ineffectual order is no order at all. The respondent evidently reached the same conclusion and on February 7, 1920, filed a schedule of rates at eighty-five cents per 1,000 cubic feet with a discount of ten cents per 1,000 cubic feet for payment within a time limited by said schedule so filed. The Public Service Commission has no power not conferred upon it by statute; it has no implied powers which it can exercise through a second or third deputy clerk over the telephone; its acts to be valid must be in their nature judicial. The Public Service Commissions Law was enacted for the benefit, alike, of the producer and consumer, lodging the right of the initiative in them as well as in the Commission. (*Public Service Commission v. Iroquois Nat. Gas Co.*, 184 App. Div. 285; *affd.*, 226 N. Y. 580, without opinion.) Section 66, subdivision 12,* after stating the power lodged in the Public Service Commission to require gas and electrical corporations to keep open for public inspection their schedule of rates and each and every privilege they have, with facilities for the same, provides further: "Unless the Commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, an electrical corporation or municipality in compliance with an order of the Commission, *except after thirty days' notice to the Commission and publication for thirty days as required by order of the Commission*, which shall plainly state the changes proposed to be made in the schedule then in force and the

* Since amd. by Laws of 1920, chap. 542.—[*REP.*]

time when the change will go into effect. The Commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe." Under this provision of the statute the respondent filed its schedule of rates as aforesaid. These rates are higher than the rates provided for in its franchise. The appellant entertained the opinion that respondent was violating the law because of such charge for gas in excess of the rates named in the franchise. Under section 74 of the Public Service Commissions Law the Commission instituted these proceedings by a petition dated April 15, 1920. The respondent answered, issue was joined, the matter came on for a hearing in April, 1920. The only question litigated was whether respondent violated any law in filing its schedule of rates and collecting thereunder. We have agreed heretofore herein, with the Special Term, that there was no prior legal order prohibiting the action of the respondent. (See 111 Misc. Rep. 692.) The remaining question is could the gas company increase its rates over the limit provided for in the franchise agreement, by filing its schedule and giving the notice, as provided in section 66, subdivision 12, of the Public Service Commissions Law. The appellant argues that it cannot be done without the intervention of the Public Service Commission. *First.* Because it is in violation of a previous order made by the Commission. *Second.* That to increase the rates over the agreed limit in the franchise agreement, the Public Service Commission must affirmatively act by giving its approval. The first ground is already disposed of, contrary to the contention of the appellant; that leaves the second ground for consideration, not as an original proposition, but in the light of decisions heretofore made involving similar situations. *Town of North Hempstead v. Pub. Serv. Corp.* (193 App. Div. 224) involves the same questions presented upon this appeal and is relied upon by appellant to sustain its contention. It is the only case sustaining appellant upon the same state of facts, and is sufficient if it may be regarded as the settled law of this State. The opinion is an able one and I should hesitate to differ with the learned judge who wrote it, but I feel that the statute (Pub. Serv. Comm. Law, § 66, subd. 12) and cases in the Court of Appeals overrule the conclusion reached in the *Hempstead Case* (*supra*). *First.* As to the Public Service

Commissions Law (*supra*). The thirty-day interim between the filing of the proposed rates; the notice to the Commission, and notice to the consumers, people, by publication of the intention to raise the rates and the extent of such raise, before the proposed raise can go into effect, mean more than a mere formality. I conceive its purpose to be that any one affected and dissatisfied with the proposed raise in rates may take action to prevent it before such rates go into effect. The procedure is orderly and it is expeditious if the parties desire to make it so. It gives both parties certain rights, which if their exercise is just and reasonable, can be maintained without the intervention of any other body. If, however, complaint is made, or the Commission itself has reason to believe that the procedure of the gas company is not just and reasonable, action is provided for under sections 71, 72* and 74 of the Public Service Commissions Law. That such procedure meets the approval of the Court of Appeals seems apparent in the *Iroquois Natural Gas Company Case* (*supra*). It is appreciated that the circumstances are somewhat different in the two cases, but I think this procedure is approved. In *People ex rel. Village of South Glens Falls v. P. S. Comm.* (225 N. Y. 216) the village granted to the United Gas, Electric Light and Fuel Company a franchise through its streets for fifty years, in consideration that it should not charge to exceed one dollar and twenty-five cents per 1,000 cubic feet of gas for illuminating or fuel purposes. This was in 1900. The opinion says: "In August of 1917 the gas company increased its rate to one dollar and sixty cents (\$1.60) per thousand cubic feet." It does not disclose in the opinion in the Court of Appeals by what method the raise was effected, but the dissenting opinion in the Appellate Division (185 App. Div. 912) shows that section 66, subdivision 12, was considered and followed by the gas company. The *South Glens Falls Case* (*supra*) is controlling here.

I favor affirmance.

Judgment reversed and a new trial granted, with costs to the appellant to abide the event.

* Since amd. by Laws of 1920, chap. 542.—[RE.]

JOHN WEGMANN, Respondent, v. THE CITY OF NEW YORK
and the UNION RAILWAY COMPANY OF NEW YORK CITY,
Appellants.

First Department, March 4, 1921.

Street railways — injury in collision of automobile with trolley pole maintained in street by company with acquiescence of city — obligation of city and company to maintain grass plots around trolley poles so placed.

In an action for damages for personal injuries sustained by an automobile passenger in a collision between the machine in which he was riding and a trolley pole maintained in the middle of a street by the company, with the acquiescence of the city, *held*, that the maintenance of such trolley pole did not constitute negligence either on the part of the company or of the city, where it appeared that the street in which the poles were maintained was 143 feet wide, and a span from side to side would necessarily be 120 feet; that it would be impracticable and dangerous to suspend high power feed wires across a street where the span was so great, without supports; and that the poles in question were plainly marked by a white stripe 4 feet wide, painted around them 5 feet from the ground.

Under such circumstances, no obligation rested either on the railway company or the city to maintain grass plots around trolley poles legitimately placed in the center of a street.

SMITH, J., dissents.

APPEAL by the defendants, The City of New York and another, from an order and judgment of the Appellate Term of the Supreme Court, First Department, entered in the office of the clerk of the county of Bronx on the 24th day of June, 1920, affirming a judgment of the Municipal Court of the City of New York, Borough of The Bronx, Second District, in favor of the plaintiff.

Henry J. Shields of counsel [*John F. O'Brien* and *Charles A. Marrin* with him on the brief; *John P. O'Brien*, Corporation Counsel], for the appellant The City of New York.

Addison B. Scoville of counsel [*Alfred T. Davison*, attorney], for the appellant Union Railway Company.

Sidney L. Teven of counsel [*Julia Alice Gainey*, attorney], for the respondent.

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The plaintiff employed the owner of an automobile to drive him from Third avenue and One Hundred and Forty-ninth street in The Bronx to Westchester village. At East One Hundred and Seventy-seventh street and Boston road the chauffeur turned into that street and proceeded east. Walker avenue starts at that part of the Boston road and runs parallel with East One Hundred and Seventy-seventh street, being separated therefrom by three cement isles of safety. The avenue and street cross the bridge over the Bronx river. A short distance beyond the bridge, One Hundred and Seventy-seventh street turns south at right angles. Walker avenue continues in an easterly direction. A short distance north of the bridge, Bronx street comes into Walker avenue, the last isle of safety being just north of the northerly line of Bronx street. Devoe avenue crosses Walker avenue at a distance of about 200 feet east of the point where One Hundred and Seventy-seventh street turns, and, therefore, there is an open plaza at this place. Crossing the bridge and after leaving it, there are no isles of safety or other divisions between Walker avenue and One Hundred and Seventy-seventh street; thus the two practically form one street 143 feet wide from building line to building line. On each of these streets there is an electric street surface railroad operated by overhead trolley wires. Span wires to support the feed and trolley wires are stretched from poles set in the northerly curb of Walker avenue to poles in the isles of safety and thence to poles on the southerly curb of One Hundred and Seventy-seventh street. In that portion of the roadways crossing the bridge and east of it to the point where Walker avenue leaves the plaza, are four poles set in about the center of the space, in the line of the southerly curb of Walker avenue. The automobile in which plaintiff was riding was proceeding on the southerly side of One Hundred and Seventy-seventh street; when on the bridge the chauffeur turned in a southeasterly direction, intending to proceed along Walker avenue, and ran into the pole in the center of the street just east of the bridge. The plaintiff suffered the injuries to his person and property for which the action was brought.

The collision occurred between six and seven o'clock in the evening of November 12, 1916. At this time and place there

was either a slight fog or a light drizzling rain. The chauffeur had only his side lights lit and did not have his head lights lit. There were three arc lights, all of which were lighted, one sixty-six feet south of the pole, another seventy-eight feet northeast of the pole, and a third one hundred and fourteen feet and seven inches northwest of the pole. The pole was painted green, and five feet from the bottom had a white stripe four feet wide painted around it. The action was brought against the Union Railway Company, on the theory that the placing of this pole in the center of the streets was negligence, and against the city on the theory that it was negligent in allowing this obstruction to remain in the street.

The defendant railway was authorized by the State to operate an overhead trolley. This carried with it the right to erect poles to carry its wires. The company can only be held liable if the poles were not placed with due regard for the public safety. As Judge CARDOZO said in *Stern v. International R. Co.* (220 N. Y. 284, 291): "The poles, if placed and maintained with due regard for the public safety, are not unlawful obstructions. They are obstructions incidental to the exercise of a statutory right." And again: "The question is not whether some other place is better. The question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable." The plaintiff's contention is, that the span wire could be stretched from a pole on the curb of Walker avenue to one on the curb of East One Hundred and Seventy-seventh street. The engineer of the railway company testified that the construction here employed was the standard construction throughout the United States; that it would be physically possible to omit the center pole and to stretch the wire for the entire distance, but that such a construction would be more dangerous to the traveling public because of the greater liability of the span wires to break, thus precipitating the live trolley and feed wires for the four tracks of both roads into the street; that these span wires were liable to break if the trolley slipped from the wire and the trolley pole struck the span wires. This danger was reduced one-half by placing the supporting pole in the center, for then if a wire was broken on one line of road, only the wires on that system would be involved, instead of both. And of

course, the greater span, sustaining double the load, would break more readily than the shorter span with half the load.

There would, therefore, appear to have been a good and sufficient reason for placing these poles where they were. There was, of course, some danger, in placing the pole in the street, that heedless, careless drivers might run into it. There was, however, greater danger of injury to persons using the streets with due care and circumspection through the added danger of breakage of the span wires, on a span of 120 feet, bearing four wires charged with a high voltage electric current which would thereby be thrown into the street. It cannot, therefore, be said that the plaintiff proved that the place chosen for this pole was so dangerous and the danger so needless that the choice was unreasonable.

The respondent relies upon the case of *Stern v. International R. Co.* (220 N. Y. 284). In that case the street was only fifty feet wide. On a narrower portion of the street (forty feet) the city had on two different occasions directed that the pole in the center of the street, which carried the wires, be removed and replaced by two poles placed in the opposite curbs. There was proof of the general disuse of poles in the center of the streets in other cities, except where grass plots or other spaces served to subdivide the highway, and finally the growth of traffic and the change in the method of locomotion, the added dangers and chances of collision, and the need obvious without evidence of freeing the space between curb and curb from obstructions which could be made without risk to serve their purpose elsewhere. The court held, "In the light of all the circumstances, we think that question was for the jury. * * * We place our judgment, not on any of these circumstances singly, but on all of them collectively."

The respondent claims that there should have been grass plots or other curbed space around the pole. But there was no grass plot there, and I know of no obligation of either the city or the company to make a more extensive appropriation of the space of this plaza to the use of the trolley companies than was necessarily required for such use. If a person would run into a trolley pole extending twenty-two feet in the air with a four-foot white band painted on it at the height of the eye, hence directly in the line of vision,

would greater safety be assured by a grass plot or a four or six-inch curb surrounding the pole?

On all the evidence, I am of opinion that the plaintiff did not sustain the burden of proving that the accident happened through the negligence of the defendants, but it was proved that it did happen through the negligence of the chauffeur. Though this cannot be imputed to the plaintiff as contributory negligence, neither are the defendants responsible for it. The case was submitted to the jury by Justice ROBITZEK with an excellent charge. We are of opinion that he should have granted the defendants' motion to dismiss the complaint.

The determination of the Appellate Term and the judgment of the Municipal Court should be reversed, with costs in this court and the Appellate Term, and judgment entered dismissing the complaint as to both defendants, with costs to each.

CLARKE, P. J., LAUGHLIN and MERRELL, JJ., concur; SMITH, J., dissents.

Determination and judgment reversed, with costs in this court and in the Appellate Term, and complaint dismissed, with costs to each defendant.

ISAAC KRULEWITCH, Appellant, v. THE NATIONAL IMPORTING AND TRADING CO., INC., Respondent.

First Department, March 4, 1921.

Sales — embargo by foreign governmental authority is no defense in an action for failure to deliver goods — mistake as to shipping conditions — prohibition of War Trade Board not effective after expiration of contract period.

In the midst of the World War the seller, doing business in a foreign country, contracted to sell and deliver goods, between certain dates, "ex dock, N. Y." The contract, among other things, provided that the "sellers are not responsible for strikes, fires, accidents or anything beyond their control." Embargoes were imposed by the seller's government prior to the time the contract was made and continued until upwards of a month subsequent to the time when the contract was to have been performed.

Held, that a contract must be rendered unlawful by a law effective in the forum, and, hence, foreign laws or embargoes would not furnish an excuse for the failure to make delivery, especially under allegations of the absence of direct transportation between the initial and terminal points.

Nor, under the circumstances, was there such a mistake as to shipping conditions as would move a court of equity to grant relief.

A defense setting up the prohibition of the War Trade Board is insufficient where it appears that the prohibition did not become effective until after the contract period had expired.

APPEAL by the plaintiff, Isaac Krulewitch, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of July, 1920, overruling plaintiff's demurrer to the affirmative defenses contained in the third amended answer.

David Vorhaus of counsel [*Joseph Fischer* with him on the brief; *House, Grossman & Vorhaus*, attorneys], for the appellant.

John L. Clark, for the respondent.

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The second amended answer contained three separate defenses. Demurrers to these defenses on the ground of insufficiency were sustained at Special Term and the order was affirmed with leave to the defendant to plead over. (191 App. Div. 904.) Pursuant to the leave thus given the defendant served a third amended answer containing five separate defenses, three of which are substantially the same as those contained in the second answer. The changes in the phraseology are not sufficient to remove the defects found in the same defenses in the second answer. The contract in this case was dated March 1, 1918, and thereby the defendant sold to the plaintiff certain tapioca flour "price 7 $\frac{3}{8}$ c per lb. ex dock N. Y. Shipment from Java Feb/Mch. * * * Remarks: These goods are bought with the understanding * * * that sellers are not responsible for strikes, fires, accidents or anything beyond their control."

The theory of the three defenses is that there was a suspension of direct transportation between Java and New York, owing to embargoes imposed by the governmental authorities

of Java prior to February 1, 1918, and continuing until after April 30, 1918; that both parties to the contract assumed that shipments could be made from Java to New York, and that because the defendant was prevented from shipping the flour by something beyond its control, and the contract was entered into because of a mutual mistake, performance by the defendant was excused.

It is a well-settled rule that "where certain things are enumerated, and such enumeration is followed or coupled with a more general description, such general description is commonly understood to cover only things *ejusdem generis* with the particular things mentioned." (*Matter of Robinson*, 203 N. Y. 380, 386.) This is not a rule limited to the construction of statutes, but is also applied in construing contracts. (*Bers v. Erie R. R. Co.*, 225 N. Y. 543; *Dauids Co. v. Hoffmann-LaRoche Chemical Works*, 178 App. Div. 855; *Traylor v. Crucible Steel Co.*, 192 id. 445, 449; *Hickman v. Cabot*, 183 Fed. Rep. 747, 749.) It is clear that a lack of transportation facilities, unless occasioned by strikes, fires or accidents, or some similar cause beyond the control of the defendant, was not provided against by the terms of this contract. The defendant undertook to sell goods which either had been shipped in February or would be shipped in March. Before entering upon this understanding it was incumbent on the defendant to ascertain whether goods had been or would be shipped within the contract time. The contract was not entered into before the commencement of the war. The World War had been raging for nearly four years. Interference with the commerce of the world and the ordinary facilities of obtaining and transporting merchandise was well known. Nevertheless, the defendant bound itself to sell and deliver this particular merchandise during a limited period and did not shield itself by proper conditions or qualifications from the effects of that war upon its engagement. (*Cameron-Hawn Realty Co. v. City of Albany*, 207 N. Y. 377, 382; *Richards & Co., Inc., v. Wreschner*, 174 App. Div. 484, 487.) The defendant has not alleged an impossibility of performance; all that it has alleged is the absence of direct transportation from Java to New York. It has not alleged the lack of facilities to transport the goods to other ports, between which and New York

shipping facilities existed. Therefore, although it has alleged a difficulty of performance it has not alleged facts tending to show an impossibility of performance.

"It is a well-settled rule of law that a party must fulfill his contractual obligations. Fraud or mutual mistake, or the fraud of one party and the mistake of the other, or an inadvertence induced by the one party and not negligence on the part of the other, may relieve from an expressed agreement, and an act of God or the law or the interfering or preventive act of the other party may free one from the performance of it; but if what is agreed to be done is possible and lawful the obligation of performance must be met. Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance. The courts will not consider the hardship or the expense or the loss to the one party, or the meagreness or the uselessness of the result to the other. They will neither make nor modify contracts nor dispense with their performance. When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it, because he promised it, and did not shield himself by proper conditions or qualifications." (*Cameron-Hawn Realty Co. v. City of Albany, supra*, 381.) A contract must be rendered unlawful by a law effective in the forum; foreign laws or embargoes do not furnish an excuse. (*Richards & Co., Inc., v. Wreschner, supra*.)

Nor was there such a mistake as would move a court of equity to grant relief.

The availability of transportation facilities was a matter extrinsic to the contract; it did not concern the plaintiff; he agreed to pay for the goods at the dock in New York; how they were to be brought there was no part of his concern, except as to the limitation as to time. It was not an element of the contract, but a matter for the defendant to consider before it made the contract. "There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a

court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance." (*Dambmann v. Schulting*, 75 N. Y. 55, 64.)

As to the defense setting up the prohibition of the War Trade Board it is sufficient to say that as alleged such prohibition did not become effective until after the contract period had expired, and expressly excepted shipments of such flour made from some foreign port on or before April 15, 1918.

The order should be reversed, with ten dollars costs and disbursements, and the demurrers sustained, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and demurrers sustained, with ten dollars costs.

In the Matter of the Transfer Tax upon the Estate of JOHN M. BOWERS, Deceased.

WILLIAM C. BOWERS and Others, as Executors, etc., of JOHN M. BOWERS, Deceased, and Others, Appellants; THE COMPTROLLER OF THE STATE OF NEW YORK, Respondent.

First Department, March 4, 1921.

Taxation — transfer tax — trust deeds permitting investment of proceeds of estate with approval of trustor — reservation by trustor of privilege, with approval of trustee, of altering, amending or extending terms of trust — failure of trustor to exercise right during lifetime — property not subject to transfer tax.

Trust deeds by which the trustor conveys property to trustees to have and to hold and to invest the same and to receive the income, rents, issues and profits arising therefrom, pass title to such property immediately to the

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trustees so that the property is not subject to a transfer tax on the death of the trustor, although the trust deeds provide that the trustor may approve investments by the trustees of the trust estate, and further, that the trustor may at any time and from time to time, with the approval of the trustees, alter, amend or extend all or any of the terms and conditions of the trust, and may confer new powers on the trustees, where it appears that the trustor made no changes in the disposition of the trust estate during his lifetime under the reservation, except to substantially increase the corpus of the trust fund by subsequent donations.

APPEAL by William C. Bowers and others from an order of the Surrogate's Court of the county of New York, entered in said surrogate's office on the 19th day of June, 1920, as resettled by an order of said surrogate entered in said surrogate's office on the 25th day of September, 1920, in so far as said order on appeal from a prior order provides that the property transferred by John M. Bowers by certain trust deeds is subject to a transfer tax.

Francis M. Scott of counsel [*Paul E. Whitten* with him on the brief; *Scott, Gerard & Bowers*, attorneys for the executors and others; *Paul E. Whitten*, attorney for the trustees], for the appellants.

Schuyler C. Carlton of counsel [*Lafayette B. Gleason*, attorney], for the respondent.

PAGE, J.:

While the notice of appeal related to the taxation of property transferred by seven trust deeds, the appellants only claim that the order was erroneous as to four.

First. The trust created for the benefit of Mary Bowers Coppell by deed dated July 27, 1908.

Second. The trust created for the benefit of Martha Dandridge Bowers by deed dated July 27, 1908.

Third. The trust created for the benefit of Mary S. Bowers, Clara Collins and William C. Bowers, 2nd, by deed dated November 7, 1910.

Fourth. The trust created for the benefit of Spotswood D. Bowers by deed dated September 23, 1916.

The only question presented for determination is whether the gifts to the trustees should be considered as transfers which did not become absolute until the death of the testator.

The first three trust deeds have identical clauses and the fourth is substantially the same except as hereinafter noted. The first deed provides: John M. Bowers pays, assigns, transfers and sets over to his brother William C. Bowers and his son-in-law Arthur Coppell certain securities and cash:

“ To Have And To Hold for and during the term of the natural life of Mary Bowers Coppell, daughter of said party of the first part, upon the special trust and confidence, to have and to hold and invest the same, and to receive the income, rents, issues and profits arising therefrom, and to apply the same to the use, maintenance and support of said Mary Bowers Coppell, and upon her death to pay over the principal and any accumulations of income to such person or persons and in such shares and lawful estates as said Mary Bowers Coppell may nominate and appoint by her Last Will and Testament or other written instrument, and in default of same to pay and transfer the same to her issue *per stirpes*, and in default of such issue, to pay and transfer the same to Martha D. Bowers and William C. Bowers, children of the party of the first part in equal shares, the issue of either then deceased taking its parent's share by representation, and if one be then deceased leaving no issue, the survivor to take the whole, and if both be then deceased, only one leaving issue, such issue to take the whole.”

There can be no question that by the terms of the foregoing provision John M. Bowers vested in the trustees the property thereby transferred with no right of reversion in himself. It has been stipulated that at the time of John M. Bowers' death Mary Bowers Coppell had the following children: Sarah Bowers Coppell, born December 31, 1901; Helen Bowers Coppell, born December 28, 1904, and Mary Bowers Coppell, born May 9, 1909. Therefore, the remainder vested in them, share and share alike, subject to be reduced by the birth of other children or divested by death. In the case of death of all substitutional remaindermen are provided. The fact that the life tenant is given the right of appointment by will or other written instrument does not prevent the present vesting of the remainder. (Real Prop. Law, § 41; *Matter of Haggerty*, 128 App. Div. 479, 481; *affd.*, 194 N. Y. 550; *Crackanthorpe v. Sickles*, 156 App. Div. 753, 755.) Mary Bowers Coppell

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became entitled to the immediate enjoyment of the income, and no right of reversion to John M. Bowers was reserved.

It is claimed, however, that subsequent clauses of the deed show that this was not a completed gift *inter vivos*.

First. "It is further expressly agreed that the parties of the second part [the trustees] may invest the trust estate and the proceeds thereof in real estate, bonds secured by mortgage in Greater New York, not exceeding two-thirds of the appraised value, or in bonds of railroads secured by mortgage, and in such bonds, stocks or other securities as are allowed by law for Savings Bank investments, and further, in any securities whatsoever which, during the lifetime of the party of the first part, may be approved by him."

In my opinion, there is nothing in this clause of the deed that tends to qualify or cut down the absolute character of the gift. The only right reserved is that if the trustees, during the lifetime of the grantor, shall desire to invest the corpus of the trust in securities more hazardous than those theretofore specified, they must first obtain his approval. This provision is not for the benefit of the grantor, nor a limitation upon the grant, but a safeguard for the protection and benefit of the trust estate and to insure the preservation of the fund for the use and purposes of the grant and in the interest of the beneficiary of the trust.

Second. "It is further expressly agreed that the party of the first part may at any time, and from time to time, with the approval of either one of the said parties of the second part, or the survivor of them, or any one of their or his successors or successor, alter, amend or extend all or any of the terms or conditions of this instrument, and may, with like consent, confer new powers upon the parties of the second part concerning the administration of their trust."

It is contended that this gave to the grantor the right at any time to change the trust in any way that he saw fit, even to revoking the deed and revesting the property in himself and by the possibility of the use of this power to retain the control of the property in himself by reason of the relationship to him of the trustees, and that as the property set aside in these trust deeds was only a comparatively small portion of the estate, this gave to him a power of coercion

over the wills of the trustees. The only use that was made of this power by John M. Bowers in his lifetime was to substantially increase the corpus of the trust fund by subsequent donations. Whether this clause reserved the right to entirely abrogate the trust, is to my mind doubtful. When he wished to reserve that right in the deed for the benefit of Spotswood D. Bowers he expressly provided: "and may with like consent wholly cancel and destroy this trust and receive back the trust estate."

But waiving that question and treating all the four trust deeds as though that right were expressly reserved, he did not exercise that right in his lifetime, and as was said in *Matter of Masury* (28 App. Div. 580, 584; *affd.*, 159 N. Y. 532): "If we are to get at the intention of the grantor from the language used in raising the trust, then there can be no doubt that John W. Masury intended this deed of trust to become of full effect whether he lived or died, and the detail with which he provided for the disposal of the property in the event of the death of his grandson precludes the idea that he had any other motive in retaining the right to annul the deed than a prudent caution would suggest. It had no bearing upon the intention. * * * There is nothing to indicate that the grantor had any intention of making use of this right except to protect the beneficiary should such action become necessary during his lifetime; and the fact that he did not make use of it up to the time of his death precludes the presumption that he would have done so at any time. At least the presumption cannot be raised to show an intention directly contrary to that expressed in the deed of trust."

And the court held that as the beneficiary had been in the enjoyment of the income from the date of the deed of trust, the title passed to the trustee, and it constituted no part of the property of John W. Masury at the time of his death and should not have been included in an appraisal of his estate for the purpose of taxation under the Transfer Tax Act.

The case under consideration is well within the limits of the *Masury* case, of which the Court of Appeals in *Matter of Bostwick* (160 N. Y. 489, 494) stated: "The limit was then reached, beyond which the courts could not go without emasculating the provisions of the statute. We thought there

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was some reason in the facts of the *Masury* case for finding an intention in the donor to make an absolute transfer of property during his life, which the mere reservation of a power to revoke was, of itself, insufficient to negative."

The facts that were persuasive in the *Masury* case are present in the instant case. The trustees took possession of the property and managed and controlled it; the beneficiaries received the income thereof from the date of the deeds, and the condition obtained unchanged (except increased in amount) and unimpaired at the time of the grantor's death. This case, therefore, is clearly distinguishable from the *Bostwick Case* (*supra*) in which the court said: "Bostwick did not, in fact, during his lifetime, dispose of the property affected by these trust deeds; inasmuch as, after their delivery to the trustee, he not only was entitled at any time to revest himself with the ownership of the property, but he continued to be able, in some cases, to enjoy it and, in all cases, practically, to manage and to dispose of it, as effectually as he might previously have done." The instant case comes clearly within the closing words of the opinion in the *Bostwick* case: "If a person intends, in good faith, to make an absolute gift of his property during his life to others and thereby to make a provision for them, which shall not be contingent as to its possession or enjoyment upon the event of his death, there is no inhibition in the act in that respect. The intent of the law is plain and it is the duty of the courts to give that construction to its provisions, which will effectuate the legislative purpose; while preserving, in all its integrity, the absolute right of every person to transfer his property during his lifetime, with such rights of enjoyment in the transferee, as the donor can give."

On the argument the learned counsel for the Comptroller claimed that in construing these deeds we should consider the possibility of all the persons to whom the remainder would go dying in a common disaster, in which event he claims that the property would revert to the estate of John M. Bowers and pass under his will. For this proposition he cites *Matter of Spingarn* (175 App. Div. 806); *Matter of Hutton* (176 id. 217); *Matter of Steinwender* (Id. 517). In all of these cases trusts were created by a will; therefore, the corpus of the

trust was subject to a transfer tax and the sole question to be determined was the rate of the tax, and we held that as the statute required that the tax should be fixed at the highest rate at which it could be taxed in any contingency, we were required to assume the possibility of all the remaindermen dying in a common disaster, in which event the trust property would go to collaterals and be subject to a five per cent tax. These cases have no bearing on this case, where the question is whether the title and right of possession and enjoyment passed during the lifetime of the grantor, or whether it was postponed to take effect upon the death of the grantor.

The order, in so far as it relates to the property the subject of the four deeds referred to in this opinion, should be reversed and the matter remitted to the Surrogate's Court for appropriate proceedings to eliminate that property from the estate of John M. Bowers for the purpose of assessing a transfer tax thereon.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Order reversed so far as indicated in opinion and the matter remitted to the Surrogate's Court for further proceedings, in accordance with opinion. Settle order on notice.

THE BRONX GAS AND ELECTRIC COMPANY, Respondent, v. THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT, LEWIS NIXON, Constituting the Public Service Commission for the First District, and Others, Defendants, Impleaded with EDWARD J. GLENNON, as District Attorney of the County of Bronx, and the CITY OF NEW YORK, Appellants.

First Department, March 4, 1921.

References—suit to have statutes fixing gas rates declared unreasonable and confiscatory—court may order reference under Code of Civil Procedure, section 1013, where long and complicated accounts must be examined.

Under section 1013 of the Code of Civil Procedure the court may order a reference in a suit in equity by a public service corporation to have cer-

tain statutes, fixing the price of gas supplied by it, declared unconstitutional, on the ground that they are unreasonable and confiscatory, where long and complicated accounts and numerous items entering into the cost of production must be inquired into.

SMITH, J., dissents.

APPEAL by the defendants, Edward J. Glennon and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 31st day of December, 1920, appointing a referee to hear and determine the whole issue.

Judson Hyatt of counsel [*James A. Donnelly* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellants.

William L. Ransom of counsel [*Edward L. Blackman, Charles A. Vilas* and *Jacob H. Goetz* with him on the brief; *Atwater & Cruikshank, attorneys*], for the respondent.

PAGE, J.:

The action is brought by the plaintiff, a public service corporation, to have chapter 125 of the Laws of 1906, in so far as it provides that the plaintiff may not charge or receive for gas manufactured, furnished or sold a sum in excess of one dollar per 1,000 cubic feet, and chapter 736 of the Laws of 1905, in so far as it prevents plaintiff from charging or receiving from the city of New York more than seventy-five cents for said gas, declared and adjudged to be now and to have become on January 1, 1917, and ever since to have been unreasonable, confiscatory, unconstitutional and void.

On the motion for a reference the attorney for the Public Service Commission and the Attorney-General acquiesced in the propriety of the appointment of a referee. The district attorney of Bronx county and the corporation counsel of the city of New York opposed such an appointment. Of all the defendants, the city of New York alone appears on this appeal.

The appellant contends that section 1013 of the Code of Civil Procedure does not authorize the compulsory appointment of a referee, except in cases where an account is directly and not incidentally involved. The action is in equity and

not at law, and, therefore, there is no question of the rights of the parties to a trial by jury which might be violated. (*Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 101.) The question to be determined is, does the rate allowed to be charged by statute afford a reasonable return on the property devoted to the public use. The rules governing such a determination have been definitely formulated by many decisions of the courts of the State and of the United States.

It is not necessary to recapitulate the elements entering into the determination, one of which alone is sufficient to show that the examination of long and complicated accounts is necessary to the determination of the ultimate issue. The acts which it is sought to have declared unconstitutional were passed fifteen and sixteen years ago. The practical experience of the company under these acts up to the 1st day of January, 1917, taking into consideration the changes that would be occasioned by the increase in the cost of materials and labor will be the determining factors in the case. When these acts were first challenged the United States Supreme Court refused to hold them unconstitutional on the prophecy of experts, but said in conclusion: "It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice." (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 54.)

The examination of the accounts of the company, with the proper segregation of the expenses in order that the relation of the costs of certain items to the total cost of production may be determined, and the effect of increase of the cost in such items upon the percentage of return from the property devoted to the public use, the extent and value of which must be determined, shows that "There are complicated accounts to be unraveled, receipts and disbursements to be classified and distributed, the properties and transactions of a great business to be appraised and dissected." (*Municipal Gas Co. v. Public Service Commission*, *supra*.) Therefore, in determining the

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main issue, the examination of a long account will be required, and the court had power to order a reference of the issues. It is contended that this result is contrary to our decision in *Kings County Lighting Co. v. Woodbury* (177 App. Div. 451). In that case the attorney for the plaintiff contended that it could prove its case without going into its accounts and showing past transactions. The court was largely influenced by this argument in making its decision. Since then there have been a number of these rate cases considered by the courts, and experience has demonstrated the futility of the hope and expectation so confidently expressed by counsel at that time. In fact, a reference to the opinion in that case at Special Term (110 Misc. Rep. 204-250, *sub nom. Kings County Lighting Co. v. Lewis*) shows with what detail the accounts of the company were presented and analyzed upon the trial.

In the case at bar, all agree that the accounts will have to be examined. The *Kings County Lighting Co.* case is not controlling on this appeal.

The order should be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., DOWLING and GREENBAUM, JJ., concur;
SMITH, J., dissents.

Order affirmed, with ten dollars costs and disbursements.

MAMIE BRODSKY, Appellant, v. WILLY RIESER, Respondent.

First Department, March 4, 1921.

Assault — complaint rendered insufficient by failure to allege intention and willfulness — motion by defendant for judgment on pleadings — denials in answer ignored — complaint treated as on demurrer.

In an action to recover damages for assault alleged to have been committed by the driver of an automobile by the starting of the car by him while the plaintiff was attempting to detain him after he had run over her son, her neglect in failing to allege that defendant's act was either intentionally or willfully or knowingly done renders the complaint insufficient.

On a motion by the defendant for judgment on the pleadings denials in the answer must be ignored and the complaint tested as on a demurrer.

APPEAL by the plaintiff, Mamie Brodsky, from an order of the Supreme Court, made at the Bronx Special Term and entered in the office of the clerk of the county of Bronx on the 28th day of November, 1919, granting the defendant's motion for judgment upon the pleadings and dismissing the complaint.

Edward C. Weinrib of counsel [*Shaine & Weinrib*, attorneys], for the appellant.

Edgar M. Troutfelt of counsel [*Bennett, Werner, Troutfelt & Grenthal*, attorneys], for the respondent.

PAGE, J.:

The complaint alleges that the defendant ran into the plaintiff's son with his automobile and continues:

"*Third.* That after the aforesaid occurrence the plaintiff endeavored to detain the defendant until the arrival of the police authorities, and that the defendant in attempting to leave the scene of the said accident, contrary to and in violation of Section 290, subdivision 3, of the Highway Law,* put his machine in motion, dragging the plaintiff for a considerable distance and thereby committed an assault upon her, causing her to become sick, sore, lame and disabled, and to suffer physical pain and mental anguish, all to her damage in the sum of Ten thousand (\$10,000) Dollars."

The defendant answered denying the material allegations of the complaint and moved for judgment on the pleadings. On such a motion the denials in the answer must be ignored and the complaint tested as on a demurrer. If the defendant intentionally started his car with knowledge that the plaintiff had hold of it, he was guilty of an assault; if unintentionally, he was chargeable with negligence.

The plaintiff has sought to allege the cause of action for an assault, but she has neglected to allege that the act was either intentionally or knowingly or willfully done. Hence the complaint is insufficient. The plaintiff may have a cause of action against the defendant, but it is insufficiently alleged. The court should have granted the plaintiff leave to amend.

* Added by Laws of 1910, chap. 374, as amd. by Laws of 1917, chap. 769.—[REP.]

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Therefore, the order will be modified by permitting the plaintiff to serve an amended complaint within twenty days after the service of the order to be entered hereon with notice of entry thereof on payment of ten dollars costs of motion at Special Term, and as modified the order will be affirmed, without costs.

CLARKE, P. J., DOWLING and GREENBAUM, JJ., concur; SMITH, J., concurs in result.

Order modified by providing that plaintiff have leave to serve amended complaint on payment of ten dollars costs of motion at Special Term, and as so modified affirmed, without costs.

SAMUEL SLUTZKIN and Others, Appellants, v. GERHARD & HEY, INC., Respondent.

First Department, March 4, 1921.

References — motion for order arresting and suspending prosecution of action — when court has power to order reference on motion.

On a motion for the arrest and suspension of the prosecution of an action to recover damages for the alleged fraudulent issue of a bill of lading, the trial court determined that there were disputed facts arising from conflicting affidavits filed to support the action and ordered a reference to determine seven different items, as follows: (1) Residence and citizenship of plaintiffs; (2) plaintiffs' place of business at the time of the transaction; (3) where the plaintiffs conducted their business in 1917; (4) as to whether plaintiffs had a place of business in New York; (5) as to circumstances concerning plaintiffs' negotiation of the bill of lading; (6) as to trade relations between the United States and Bolshevik Russia; (7) and as "to what extent" it was possible for defendant to ascertain the facts with respect to the transfer in Moscow, Russia, of the bill of lading and other documents in the case. The first four queries were either admitted or not controverted. The other queries were either matters to be decided at a later stage of the case or were wholly irrelevant to the motion. *Held*, that an order of reference was not proper in such case.

Orders of reference upon motions should be rarely made and should be resorted to only in exceptional cases, where the interests of justice would require the unraveling of complicated facts, which cannot be determined upon hopelessly conflicting affidavits.

APPEAL by the plaintiffs, Samuel Slutzkin and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of January, 1921, appointing a referee to report upon questions of fact arising upon a motion made by the defendant to stay plaintiffs' prosecution of this action.

J. Charles Weschler of counsel [*Weschler & Kohn*, attorneys], for the appellants.

Chase Mellen of counsel [*Strong & Mellen*, attorneys], for the respondent.

GREENBAUM, J.:

The action is brought to recover damages for the alleged fraudulent issue of a bill of lading. The complaint consists of two causes of action arising out of the same transaction. The first is predicated upon a common-law fraud in the issuance of a bill of lading, which falsely represented that the defendant had received from the Quaker City Morocco Company eighty cases of glazed kid, to be transported by the steamship *Kiafuku Maru* to Moscow, Russia, and to be delivered to order or his assigns, and the second cause of action for like damages for the issuance of such bill of lading, in violation of various State and Federal statutes, which prohibit the issuance of bills of lading for goods not received and bills of lading containing false statements and the negotiation of bills of lading when the goods are not in the possession of the carrier. The plaintiffs sue as holders of the negotiable bill for a valuable consideration.

The defendant demurred to the complaint for insufficiency. The plaintiffs thereupon moved for judgment on the pleadings. While that motion was pending and before the day fixed for its argument, the defendant moved "for an order arresting and suspending the further prosecution of this action by the plaintiff during the continuance of the existing conditions, including the non-existence of diplomatic relations and of intercourse and communication between the government and citizens of that part of Russia under the control of the Bolsheviki and the Government and citizens of the United States."

The motion was made upon the affidavit of Medad E. Stone, president of the defendant, in which he alleges, "on information and belief that * * * the plaintiffs herein were born in and are citizens of that part of Russia now under the control and domination of the Bolsheviki hereinafter referred to as Bolshevik Russia and that all save one of said plaintiffs are at present resident therein; that plaintiffs do not maintain any office for the transaction of business in this country and that any money that they might recover in this action would be sent into Russia and would go toward increasing the power and influence of the Bolshevik rule therein."

The sources of affiant's information and the grounds of his belief are alleged statements made to him or to his attorneys by Ezekiel Slutzkin, one of the plaintiffs, and his attorneys, that the other members of the plaintiff partnership are residents of Moscow, and from investigations conducted by the office of the attorneys for the defendant which included an examination of the directory and telephone books of the city of New York. What the statements were alleged to have been made to affiant or his attorneys are not disclosed. Stone further alleged, upon information and belief, that the policy and practice of the United States government as announced in numerous proclamations, notes and rulings are to prohibit all intercourse between citizens of Bolsheviki Russia and citizens of the United States; that the course of mail between the United States and Bolsheviki Russia is suspended; that no passports issue, and that the policy of the United States has amounted to a complete separation and segregation of the citizens of Bolsheviki Russia from the citizens of the United States. In support of those statements, affiant referred to the note of Secretary of State Colby sent to Russia on August 10, 1920; a circular of the Federal Reserve Bank of New York, dated August 12, 1919; the proclamation of the President, dated June 26, 1919, and an announcement of the State Department dated July 8, 1920; but no copies of these alleged official documents and pronouncements were annexed to the moving papers, nor are they or any extract therefrom printed in the record on appeal or briefs. On the other hand, plaintiffs in opposition to the motion submitted an affidavit of Ezekiel

Slutzkin, one of the plaintiffs, to the effect that Slutzkin Bros. have and maintain an office for the transaction of business at 15 Maiden Lane, New York, under the firm name of Slutzkin Bros.; that they are listed in the telephone directory, a copy of the directory on which the firm name appeared being annexed. The affiant further alleged as follows: "Of the four plaintiffs, myself, Moise Slutzkin and Abraham Slutzkin were born in Riga, which is not under the domination and control of the Bolsheviki and is not part of Bolsheviki Russia, but is part of the country known as Latvia, but irrespective of the birth place of the four plaintiffs, they all resided in Riga until 1915, in the early part of the war and were citizens of that part of Russia, which is known as Latvia. At that time Riga was threatened with invasion by Germany and all of the residents of Russia were ordered to evacuate and my family, including all of the plaintiffs, thereupon left Riga and went to Moscow. We resided in Moscow until 1918 as refugees. In July, 1918, I escaped from Moscow. Neither I nor any of my brothers had ever intended living there but it had been forced upon us. All of our property was taken away from us and we have not participated in the Bolsheviki rule or submitted to their jurisdiction but escaped as early as we could. After I escaped from Moscow two of my brothers escaped. Three of the plaintiffs, including myself, went to Copenhagen, where we went into business under the name of the Russian American Company — Leather Trade; this business is still in existence with a capital of one million kronen and * * * belongs to the plaintiffs and no one else is interested therein. My other brother, one of the plaintiffs had in the meantime left Russia and never returned to Russia, except for one week to visit me and that was in 1915. He was a representative of the plaintiffs in Stockholm and opened a business there and later joined the other brothers in Copenhagen. In August, 1919, my brother Abraham and I came to New York and intended to remain and make this our home. We started in business here, all of the plaintiffs being exporters here and have continued and intend to continue as such and I intend to become a citizen of this country as well as my brother Abraham. My brother Abraham is now in Riga on a business matter, having left New York for that purpose only and intending to return shortly to

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remain here, except insofar as he may have to travel abroad on business. My two other brothers, Samuel and Moise have charge of our business of the Russian American Company at Copenhagen. They are there now and all of us have left Russia with no intention of ever returning excepting perhaps if we desire to return for visits and perhaps to reclaim our property that was taken from us by the Bolsheviki in Moscow, if such an opportunity will ever present itself."

The affidavit further shows that the person from whom the bill of lading was purchased, one Necha Borenstein, is now in New York as are also her manager and various officials of the bank in which the bill of lading transaction was handled. To this affidavit the defendant submitted a replying affidavit of Abraham J. Stybel that the firm of I. Slutzkin & Sons had a shoe factory in Moscow from 1916 until 1918 and that "all business people, including manufacturers, had evacuated the city of Riga at the time I commenced business in Moscow and many of them, including the said firm of I. Slutzkin & Sons, carried on their business and factory after the evacuation of Riga in the city of Moscow." That affidavit, instead of being a denial of any statements contained in the plaintiffs' affidavit, is entirely corroborative of what the plaintiffs alleged. Upon these affidavits and papers the court held that there were disputed facts and made an order referring the matter to a referee, to take proof as to seven different items and staying all proceedings in the interim.

These seven items about which the referee was appointed to inquire may be summarized as follows: 1. As to the question of the residence and citizenship of plaintiffs. As to this it is to be observed that the plaintiffs' affidavit fully sets forth the facts in that regard, which are not controverted by the defendant. 2. As to plaintiffs' place of business in Moscow when the transactions in suit arose. That is also fully explained in the affidavit of the plaintiffs and is not controverted. 3. As to where the plaintiffs conducted business in December, 1917. The complaint admits that the transactions in question took place in Moscow. 4. As to whether plaintiffs have a place of business in New York. That was fully set forth in the plaintiffs' affidavit and defendant's assertion that the telephone directory did not disclose the place of business of plaintiffs was

controverted by the submission of a copy of the page of the directory in which their place of business appears. 5. As to the circumstances attendant upon the plaintiffs' negotiation of the bill of lading in suit. 6. As to what extent there exists commercial intercourse or means of communication between citizens of the United States and citizens of Bolsheviki Russia, which could only properly be shown by official documents. 7. As "to what extent," if any, it is possible for defendant to ascertain the facts with respect to the transfer or alleged transfer in Moscow, Russia, in December, 1917, or thereafter of the bill of lading and other documents involved in this action.

It thus appears that an examination is directed concerning the allegations in defendant's moving papers, which are unsupported by any facts; to an investigation of the diplomatic relations between Russia and the United States which it was incumbent in the first instance upon the defendant to show, and matters which might be appropriate after issue had been joined upon the service of an answer affecting the merits of plaintiffs' causes of action, but which are wholly irrelevant to the motion for a stay and which were not asked for in the notice of motion.

It appears from a copy of the printed circular alleged to have been obtained by plaintiffs from the Deputy Governor of the Federal Reserve Bank, dated August 12, 1919, and printed in the record on appeal, that the "present situation is, therefore, that all restrictions have been removed from the export of coin, bullion and currency and from transactions in foreign exchange except as to (1) transactions with or for persons in that part of Russia now under control of the so-called Bolshevik Government; (2) the importation of, or exchange of transactions in Russian rubles."

It will thus be noted that whatever restrictions of intercourse with Russia do exist, they are limited to that part of Russia now under the control of the so-called Soviet Government.

This court had occasion recently to reiterate the well-settled practice in this State that orders of reference upon motions should be rarely made and should be resorted to only in exceptional cases, where the interests of justice would

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require the unraveling of complicated facts, which cannot be determined upon hopelessly conflicting affidavits. Moreover, in the papers as submitted there appears to be no reason for staying plaintiffs' active prosecution of this action.

It will be ample time to stay the payment of money to plaintiffs by defendant if and when judgment is rendered and if and when defendant is prepared to pay over the money upon any such judgment and if it should then appear that the plaintiffs are Russian citizens and that the relations between Russia and our government are such as to require the withholding of plaintiffs' receipt of any moneys payable under the judgment.

The order appealed from is reversed, with ten dollars costs and disbursements, and the motion to stay plaintiffs' proceedings is denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion for stay denied, with ten dollars costs.

In the Matter of the Judicial Settlement of the Account of Proceedings of CHARLES LINKINS, as Executor, etc., of ROBERT PLUYM, Deceased.

SAMUEL O. OCHS, Appellant; CHARLES LINKINS, as Executor of ROBERT PLUYM, Deceased, and Others, Respondents.

First Department, March 4, 1921.

Executors and administrators — when release of claims by executor against partnership to testator's partner does not bar such partner's right to assert claim as legatee — Appellate Division — scope of review on appeal from surrogate's decree — failure of appellant to file exceptions — when legatee and judgment creditor of another legatee not proper party on judicial settlement.

A testator, during his lifetime, was a member of a partnership. By his will he provided that his partner should receive fifteen per cent of the value of his share of the partnership property, and that liquidation should take

place within a year and the proceeds should be turned over to the executor. After his death, testator's share of the proceeds of the partnership property was turned over to the executor who gave a release to the partnership for the same. However, the partner refused to give a release to the executor, on the ground that he had already turned over to the executor all that belonged to the estate. On reference the referee found the partner to be entitled to fifteen per cent of the amount turned over, but the surrogate, on motion to confirm the executor's account, found that the partner had not sufficiently proven that his claim should be allowed.

Held, that as the partner had refused to release the executor, and in view of other considerations, the adjustment between the partnership and the executor was limited strictly to the testator's interest in the partnership property, without regard to the partner's claim under the will, which should be allowed.

A notice of appeal from the surrogate's decree, sustaining exceptions to the findings of the referee and disallowing the partner's claim, brings up for review the order sustaining the exception to the allowance of the claim, although the appellant, the partner, filed no exceptions to the decree of the surrogate.

A legatee who has assigned his legacy for advances in excess of his distributive share and who is also a judgment creditor of another legatee has no standing in court on a judicial settlement either as legatee or as a judgment creditor of the testator.

APPEAL by Samuel O. Ochs, a legatee under the last will and testament of Robert Pluym, deceased, from that part of a decree of the Surrogate's Court of the county of New York, entered in the office of said surrogate on the 9th day of June, 1920, which modified the report of the referee in disallowing the claim of the legatee to fifteen per cent of \$22,500, which had been approved by the referee, and as stated in the notice of appeal said legatee appeals also upon the facts and asks the court to exercise its powers under section 2763 of the Code of Civil Procedure.

J. Charles Weschler of counsel [*Weschler & Kohn*, attorneys], for the appellant.

I. Balch Louis, for the respondent Victor Pluym.

GREENBAUM, J.:

Samuel O. Ochs, a legatee under the last will and testament of Robert Pluym, deceased, appeals from so much of the decree of the surrogate of the county of New York as modified

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the report of Peter B. Olney, Esq., referee appointed by the surrogate to pass upon the accounts of the executor of the estate, in disallowing the claim of said Ochs to fifteen per cent of \$22,500, which had been approved by the referee.

The facts are, briefly, these: Samuel O. Ochs, the claimant, was a partner of the deceased Robert Pluym under a partnership agreement dated July 17, 1913, for the sale of automobiles, flying machines and other articles at Petrograd, Russia, under the terms of which each of the partners was to contribute 25,000 rubles. In January, 1915, an agreement was made between the firm of Pluym & Ochs and the firm of Gaston, Williams & Wigmore, under which the latter acquired a one-half interest in the firm of Pluym & Ochs. In May, 1915, Robert Pluym died leaving a last will and testament, the "fourth" paragraph of which reads as follows:

"While in Russia during the summer of 1914, I became seriously ill, and because of the devotion on the part of Samuel O. Ochs, and members of his family, I caused to be drafted and thereafter signed a certain paper writing, certified to by the American Consul at Petrograd, Russia, in which said paper writing I expressed the wish that the Samuel O. Ochs, co-partner with me in the business of T/D Pluym and Ochs, Petrograd, Russia, should have my interest therein in the event of my death. However, it is now my last will and wish that said paper writing, be now null and void and to have no effect whatever, but my last will with regard to my interest in said business of 'T/D Pluym & Ochs' is that upon my death, the said business shall be liquidated within one year from date of my death, and the *proceeds thereof* turned over to my *executors* who are directed to give, and I do hereby give and bequeath unto said Samuel O. Ochs, a sum of money equal to fifteen (15%) per cent of the value of my interest in said business, and five (5%) per cent of the total profits accrued up to the date of such liquidation I give and bequeath to my friend William F. Shipley, in recognition of his valued services to me, and the balance of my interest in said business shall form a part of the residuum of my estate, provided, however, that in event of my death the said Samuel O. Ochs shall have the right, if he so desires, to continue the business under the partnership name."

In September, 1917, Charles Linkins, the executor of the last will and testament of Robert Pluym, brought an action against Ochs individually and as surviving partner of Pluym & Ochs and Gaston, Williams & Wigmore for an accounting of the partnership affairs for the purpose of ascertaining the interest of the deceased Pluym in the partnership. In view of the difficulties in getting access to the records in Russia, the parties to the accounting action entered into negotiations for the purpose of agreeing upon the amount of the decedent's interest in the copartnership, as a result of which an adjustment was reached under which Ochs paid to the executor of the estate the sum of \$22,500 in settlement of the action. The executor executed a release to Ochs individually and as surviving partner of the firm of Pluym & Ochs, Ltd., as well as to Gaston, Williams & Wigmore. There was no release given to the executor on the part of Ochs and indeed it appears that Ochs refused to give such a release because as he said: "I had given him everything that belonged to Mr. Pluym and I was entitled to what did belong to me."

Subsequently the executor filed his account, to which certain objections were filed and thereafter the surrogate appointed Peter B. Olney, Esq., as referee to hear and determine all questions arising upon the settlement of the account and to report to the court. The referee in due course reported *inter alia* that Samuel O. Ochs was entitled to recover \$3,375, being fifteen per cent of \$22,500, the amount received in settlement of the partnership accounting action. One Victor Pluym, a legatee, thereupon filed exceptions to the report in respect of this allowance. The learned surrogate after a hearing upon the motion to confirm the report of the referee held that "the claim of Samuel O. Ochs to 15% of the moneys of this estate does not appear to have been sufficiently established and should not be allowed. The exceptions taken to the findings of the referee with respect to this claim are sustained."

It is from that part of the decree entered upon this decision disallowing the claim of Samuel O. Ochs that this appeal is taken. In this connection it may be noted that the executor moved for the confirmation of the referee's report, thus recognizing the propriety of allowing the plaintiff's claim.

At the outset respondent attacks the standing of the appel-

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lant in this court, upon the ground that having filed no exceptions to the decree of the surrogate there is nothing to review. There is no merit in that contention. The referee made his findings of fact and conclusions of law under which the claim of the appellant was allowed. To these findings the respondent filed exceptions and the surrogate on the motion for confirmation of the referee's report sustained the exceptions. The notice of appeal is from the surrogate's decree, which brings up for review the order sustaining the exceptions to the report of the referee. (*Burger v. Burger*, 111 N. Y. 523.)

On the other hand, the appellant Ochs urges that the respondent Victor Pluym, who alone filed exceptions to the report, has no standing before this court. It appears that respondent was a legatee under the last will and testament of Robert Pluym, but that he assigned his legacy to the McClintock-Trunkey Company on February 25, 1918, for advances made to him amounting to \$2,579.25, which is a sum greater than the distributive share allowed him as legatee. He is, however, a judgment creditor of one Gustave Pluym, another legatee under the Pluym will, whose interest in the estate was levied upon in proceedings taken under the judgment recovered against him by respondent.

In *Duncan v. Guest* (5 Redf. 440) the surrogate held: "I think it quite clear that the creditors of a distributee are not proper parties before me on an accounting. Only creditors of the decedent or those claiming to be such, can appear or be heard."

It would seem to follow that Victor Pluym has no standing before the court either as legatee or as a judgment creditor of Gustave Pluym. However, regardless of the apparent well-founded objections to respondent's presence in this matter it seems to us desirable to pass upon the merits of the claim before us.

The learned referee in the executor's accounting proceedings reports as follows: "Prior to the settlement of this suit a memorandum of account was produced and made use of in arriving at a basis of settlement. The evidence shows that it was difficult to arrive at the exact state of the accounts because it was impossible to obtain data from Russia bearing on the

said accounts. I find, therefore, that the sum of \$22,500 thus paid over was on account of the value of Pluym's interest in the business of Pluym & Ochs. While there is presumption that where there are mutual claims and a settlement is arrived at that the mutual claims are all embraced, this is only a presumption and may be overcome by proof to the contrary. Here Ochs obtained a release of all claims of the Pluym estate against him. Ochs was asked for a release of his claim against the executor and refused to sign it because, as he testified, 'I had given him everything that belonged to Mr. Pluym and I was entitled to what did belong to me.' "

There is no contradiction of the facts as found by the referee and the executor acquiesced in the referee's conclusions in moving to confirm his report. It seems to us to be absolutely clear upon the facts that the result of the partnership accounting action was an adjustment as between those interested in the partnership business and the estate, strictly limited to the amount of the interest of the decedent in the partnership business, without regard to appellant's claim under the will. It is also to be remembered that the claimant was not the only one interested in the partnership accounting, but that Gaston, Williams & Wigmore, who owned one-half interest in the partnership, were concerned therein.

Ochs never released the estate from his claim as legatee and hence it follows that the claimant as legatee became entitled to his legacy based upon fifteen per cent of the settlement of \$22,500.

The decree of the surrogate is modified by allowing the payment to the appellant of his legacy in the sum of \$3,375, being fifteen per cent of \$22,500, the value of the decedent's interest in the firm of Pluym & Ochs, and as thus modified the decree is affirmed, with costs and disbursements to be taxed against respondent.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,
concur.

Decree modified as directed in opinion, and as so modified affirmed, with costs to be taxed against respondent. Settle order on notice.

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In the Matter of the Application of BARONESS ALTHEA SALVADOR to Set Aside the Decree Dated the 7th Day of December, 1914, Admitting to Probate the Last Will and Testament of FRANK LESLIE, Deceased.

In the Matter of the Application of HENRIETTA R. HURLBUT, as Administratrix of the Goods, Chattels and Credits of the BARONESS ALTHEA SALVADOR, to Revive the Said Application of Said BARONESS ALTHEA SALVADOR, Who Is Now Deceased.

WILLIAM NELSON CROMWELL and LOUIS H. CRAMER, Individually and as Executors, etc., of FRANK LESLIE, Deceased, and CARRIE CHAPMAN CATT, Appellants; HENRIETTA R. HURLBUT, Respondent.

First Department, March 4, 1921.

Wills — probate — motion by administratrix of contestant for revivor of lapsed proceeding to set aside decree of probate after abortive attempts to establish claim against estate — inference of bad faith — validity of will determined in prior proceeding.

A motion made by the administratrix of the contestant of a will for the revivor of a lapsed proceeding commenced by the contestant to set aside a decree of probate should be denied, where it appears that the contestant had made several abortive attempts to establish her claim against the estate; that an inference might be drawn that the proceeding was not in good faith to establish the original claim, but designed among other things to defeat another legacy; that the will had been sustained in a prior proceeding, and that the proceeding sought to be revived was commenced long after the distribution of the estate.

APPEAL by William Nelson Cromwell and others from an order of the Surrogate's Court of the county of New York entered in the office of said surrogate on the 26th day of July, 1920, as resettled by an order entered in said surrogate's office on the 18th day of August, 1920, granting the petition of one Henrietta R. Hurlbut, as administratrix of Baroness Althea Salvador, praying for the revivor of a lapsed proceeding alleged to have been commenced in her lifetime by the late Baroness Salvador to set aside the decree probating decedent's will.

Ralph Royall of counsel [*Hiram C. Todd* with him on the brief; *Sullivan & Cromwell*, attorneys], for the appellant *William Nelson Cromwell*, individually and as executor.

Edgar T. Brackett, attorney for the appellant *Louis H. Cramer*, individually and as executor.

Horace E. Parker, for the appellant *Carrie Chapman Catt*.

Roger Foster, for the respondent.

GREENBAUM, J.:

The last will and testament of the late *Mrs. Frank Leslie* was duly admitted to probate by decree of the Surrogate's Court, dated December 7, 1914. The *Baroness Salvador* was not mentioned in the will.

Thereafter a proceeding was commenced by the grandchildren of the deceased husband of the late *Mrs. Frank Leslie* to set aside the probate upon the ground that the decedent, *Mrs. Leslie*, was the illegitimate daughter of a negress slave and had no legal next of kin and that she did not have mental capacity to make a will; that her property was derived from her husband and, therefore, by virtue of section 91 of the Decedent Estate Law, reverted to her husband's heirs at law.

The charges were disposed of upon the merits and were held to be without foundation. (*Matter of Leslie*, 92 Misc. Rep. 663; *affd.*, 175 App. Div. 108.)

The history of the present claim may be briefly stated as follows: During the lifetime of the *Baroness Salvador* and in January, 1915, she wrote a letter to *Mrs. Hurlbut*, her sister, in which she referred to a claim which she had against the departed *Mrs. Leslie* for expenses incurred in her behalf, and in which she also stated that the late *Mrs. Leslie* had told her in June, 1914, "that in addition to a sum of money, she was leaving a diamond sunburst which she has shown me many times and other things. I am sure that the estate would willingly send me \$1,000, because until *Mrs. Leslie* was influenced, I was her first thought, after her own people. You can do what you please with this letter, but I have had many lawsuits, since my husband's death, and my hope has been that *Mrs. Leslie* would keep her promise and not only make a settlement with me but at least to give me back my own, with

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interest." Thereupon Mrs. Hurlbut presented a claim in behalf of her sister, the baroness, to the executors in the amount of \$1,000. Upon being told that the proper way to present a claim was to have it verified, there was submitted in August, 1915, a verified proof of claim of the Baroness Salvador increased from \$1,000 to \$9,700, which was made up of a number of items, among which may be mentioned household expenses, twenty years at \$100 per year, \$2,000; eighteen journeys to London at \$100 each, \$1,800; nursing during three illnesses in 1900, 1904 and 1910, \$500; secretarial and other duties for twenty-one years, \$4,200.

The executors rejected the claim. On January 28, 1916, the executors presented their accounts for judicial settlement and duly cited the Baroness Salvador in the proceedings, which were referred to Hon. Charles F. Brown as referee to pass upon the accounts and claims. The baroness appeared before the referee by her attorney at numerous hearings during 1916 and offered testimony to establish her claim against the estate.

On April 28, 1916, as appears from the stenographer's minutes taken before the referee, the attorney of the baroness offered two prior wills of Mrs. Leslie, one dated April 24, 1907, and the other dated June 29, 1911, to the introduction of which objection was made on the ground that they were incompetent, immaterial and privileged. The referee overruled the objection and said: "I admit so much of them as contains a bequest to Baroness Althea Salvador in the following language, in the will of April 24th, 1907: 'I give and bequeath to Baroness Althea Salvador of Paris my diamond brooch with coronet on top;' and so much of the will bearing date June 29th, 1911, as contains a bequest to the Baroness Althea Salvador in the same language. I exclude all other parts of them, because they have no reference or connection with the Baroness Althea Salvador, and no other mention of her name."

On June 29, 1916, a motion was made on behalf of the baroness to reopen the hearing of her claim to take further testimony. Although this motion was granted no further testimony was submitted. The referee submitted his report in which he advised that the claim of the Baroness Althea Salvador be dismissed. The report was confirmed by decree

of the surrogate. No further action of any kind appears to have been taken by the Baroness Salvador against the estate until April 9, 1919, when she filed a petition again through her sister Mrs. Hurlbut, praying that the decree of December 7, 1914, admitting to probate the last will and testament of the decedent, be set aside and vacated. The petition alleged that the decedent was at the time of the execution of her alleged last will upwards of eighty years of age; was of unsound mind; insane; that she was subject to delusions, among which were that she was poor, of noble blood, "although she was and when of sound mind knew she was descended from an obscure family and had no baronial blood nor noble blood of any kind and * * * that she was of illegitimate birth."

The petition also referred to the fact that the decedent was a moral pervert, a sexual degenerate, suffering from various diseases including locomotor ataxia, and contained many other reflections upon her character and life. The petition also alleged that one Mrs. Carrie Chapman Catt was a legatee to the extent of \$1,000,000 coupled with the request that the legacy be used for the purpose of advancing the cause of woman suffrage, and that Mrs. Catt procured the execution of said paper which was admitted to probate by exercising undue influence over the decedent, alleging that Mrs. Leslie was "easily influenced by flattery and cajolery, in the exercise of which said Mrs. Catt excelled."

On May 11, 1919, the Baroness Salvador died and on the 22d of April, 1920, Mrs. Hurlbut, who had been appointed administratrix of the estate of the Baroness Salvador, petitioned the Surrogate's Court for an order that the proceedings theretofore instituted by her to set aside the probate of the paper purporting to be the last will and testament of Frank Leslie, deceased, be revived. Upon the hearing of this petition an order was duly made by one of the learned surrogates that the motion for revivor be granted.

In the petition for revivor reference is made to the alleged fact that in a prior will decedent had appointed trustees "to create and incorporate an institute to be called the Frank Leslie Institute, for charitable purposes, namely, the benefit of women who were poor and struggling artists, authors,

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journalists, musicians, actresses, sculptors and painters, and to transfer her residuary estate to said institute."

The petition further alleges that since the filing of the original petition by the Baroness Salvador an institution is in existence in the city of New York under the name of the "Four Arts," which discharges the functions, so far as it is able, intended by said Frank Leslie to be exercised by said Frank Leslie Home, and which is in urgent need of funds in order to extend its privileges to young and struggling artists who may need and wish assistance from said institution but for whom there is at present insufficient accommodation there.

It also appears that the executors have paid over substantially all of the assets of the estate of the decedent, amounting to upwards of \$1,700,000 in accordance with the surrogate's decree.

In *Matter of Leslie* (175 App. Div. 108, 112) this court in its opinion stated as follows: "It is not open to any one, merely by asserting a nebulous claim to an estate, to ask that a solemn decree admitting a will to probate be vacated, and a long and expensive contest be entered upon. He must first show with some degree of probability that his claim is well founded and that, if afforded an opportunity, he will be able to substantiate it."

We are of opinion, in view of the history of the various claims made by the late Baroness Salvador, that the motion made by her administratrix should have been denied. In the first place, she originally only asserted a claim as creditor for \$1,000 against the estate. She subsequently increased the claim to \$9,700. The claim being disallowed by the court, she began a proceeding to set aside the probate proceedings on the ground that she was a legatee under prior wills and that the paper writing which was probated was not the will of decedent but was induced by undue influence and was the product of a diseased mind. The evidence showed that the diamond brooch which was mentioned in two prior wills was of the value of about \$1,000. Upon such a state of facts it is now sought to set aside the will after abortive efforts to establish a claim against the estate. That the procurement of the diamond brooch in the two former wills is not the real purpose of the petitioner becomes apparent from the fact that the

petition for revivor contains allegations from which it may be fairly inferred that one of the objects of the revivor proceeding is to defeat the legacy given to Mrs. Carrie Chapman Catt for the promotion of the cause of woman suffrage so that some other institution may receive the benefits of that legacy. In other words, it is apparent that this is an attempt, under the guise of seeking the collection of a legacy for a comparatively small amount, to abuse the process of the court for a purpose ulterior to that for which the petitioner ostensibly has brought this proceeding. Besides it is evident that the proceeding is not brought in good faith; that upon a previous contest, the validity of the will was sustained, and that in view of the distribution of the estate long before the commencement of this proceeding, it would work a gross injustice and a great hardship upon those who would be required to defend what seems to be an ill-founded claim. Justice requires a reversal of the order appealed from, with ten dollars costs and disbursements, and denial of the motion of revivor, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,
concur.

Order reversed, with ten dollars costs and disbursements,
and motion for revivor denied, with ten dollars costs.

HENRY MANDEL, Respondent, v. GUARDIAN HOLDING CO.,
INC., Defendant, Impleaded with NATIONAL ASSOCIATION
BUILDING CORPORATION, Appellant.

First Department, March 4, 1921.

Vendor and purchaser — bill of particulars may be required as to consideration of option in action for specific performance thereof after property conveyed to another during life of option — contract for sale of real property does not create objection to title — effect of reference to option in deed.

Where the holder of an option to purchase real property brings an action of specific performance against the person giving the option, and it appears that the property was sold during the life of the option to a third party,

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by contract of sale subject "to such rights as plaintiff had under his said option," but on sale of the property subsequently no mention of the option was made in the deed, a bill of particulars may be required of the plaintiff compelling him to state what the alleged "valuable consideration" of his option was, and when and where such valuable consideration was given to the vendor.

A contract for the sale of real property, even though recorded, is not an incumbrance against the property, and does not create a valid objection to the title.

It seems, however, that if the deed contains a clause stating that it is subject to an option agreement, it may create a different situation, in that it might show that the vendee acquired no greater interest than the vendor had.

PAGE, J., dissents.

APPEAL by the defendant, National Association Building Corporation, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of January, 1921, as denied that part of the appellant's motion for a verified bill of particulars of plaintiff's complaint which sought to obtain the details of the alleged valuable consideration for the option agreement upon which this action is brought.

Louis Salant of counsel [*Joseph J. Cunningham* with him on the brief; *Aronson & Salant*, attorneys], for the appellant.

Joseph J. Corn of counsel [*Eisman, Lee, Corn & Lewine*, attorneys], for the respondent.

GREENBAUM, J.:

The action is brought for the specific performance of an alleged option agreement, dated November 18, 1919, given by the defendant Guardian Holding Co., Inc., to the plaintiff for a "valuable consideration," for the purchase of premises situated at 471-473 Fifth avenue and 4-6 East Forty-first street, for the sum of \$1,200,000, upon certain terms and conditions therein set forth. According to its terms the option expired on January 18, 1920. The complaint asks that the right, title and interest of the appellant, the National Association Building Corporation, in said premises be adjudged subject and subordinate to plaintiff's rights, and that the appellant

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be adjudged as trustee of said premises for plaintiff's benefit and directed to convey said premises and account to the plaintiff for the rents, issues and profits thereof.

The complaint alleges that the Guardian Holding Co., Inc., was the owner and in possession of the premises in question on November 18, 1919; that on December 27, 1919, it made an executory agreement with the Barclay Holding Corporation for the sale of the said premises, containing a clause "that said premises were encumbered by and subject to plaintiff's said option;" that thereafter and prior to January 17, 1920, and before the commencement of this action plaintiff duly notified the Guardian Holding Co., Inc., that he desired to enter into a formal written contract for the sale of the premises to him upon the terms and conditions mentioned in the option agreement, and at the same time duly tendered the sum of \$25,000 as a deposit on said proposed written contract, all in accordance with the provisions of the option agreement, but that the Guardian Holding Co., Inc., refused to enter into any such formal written agreement; that on or about January 5, 1920, the Barclay Holding Corporation, "without plaintiff's consent, entered into an agreement with one James T. Lee to sell and convey said premises to said Lee;" that said Lee then had full knowledge and notice of plaintiff's option; that in said Lee's agreement with the Barclay Holding Corporation it was expressly set forth, "(a) that said Barclay Holding Corporation was under contract to purchase said premises, and that if for any reason other than its own fault it failed to acquire title thereto, its liability should be limited to the return of said Lee's deposit and its expenses for examining title; and (b) that said premises were encumbered by and should be conveyed by said Barclay Holding Corporation to said Lee subject to such rights as plaintiff had under his said option." It is also alleged that Lee, who was the president of the defendant National Association Building Corporation, thereafter assigned his contract to said corporation.

The complaint further alleges that on or about February 2, 1920, the Guardian Holding Co., Inc., conveyed the premises in question to the Barclay Holding Corporation without any consideration therefor, and that subsequently and on March 5, 1920, the Barclay Holding Corporation, without plaintiff's

consent, executed a deed after the filing of the notice of pendency of this action, conveying the premises to the appellant, the National Association Building Corporation. Nothing appears in the complaint indicating whether or not either the deed to the Barclay Holding Corporation or the deed from that company to the defendant National Association Building Corporation contained any reference to the option agreement of the plaintiff.

Respondent opposed the motion for a bill of particulars of the consideration upon which his option was based, upon the ground that the appellant was not in a position to question the consideration, contending that the situation of the appellant is analogous to that of a grantee who, having accepted a deed to real property subject to a specifically described mortgage or lien, could not question its consideration or validity. We do not think it necessary to pass upon the question whether the analogy made by the learned counsel for the respondent is applicable to an executory agreement for the sale of property which is made subject to an existing option agreement to another for the purchase of the same property, for the reason that the amended complaint alleges that the contract of the Barclay Corporation with the appellant was only subject "to such rights as plaintiff had under his said option," thus leaving the defendant in a position to inquire into the validity or consideration of the option to establish, if he can, that plaintiff had acquired no rights thereunder.

The fact that the agreement given to the Barclay Corporation contained a clause that it was subject to plaintiff's option, and that appellant had notice thereof, while perhaps important to plaintiff in establishing his cause of action for specific performance, has no bearing upon appellant's right to inquire into the consideration of the option agreement, as it does not appear that the deed to the Barclay Corporation contained any clause showing that its title was subject to the option agreement. A contract for the sale of real property, even though recorded, is not an incumbrance against the property and it does not create a valid objection to the title. (*Boyd v. Schlesinger*, 59 N. Y. 301; *Washburn v. Burnham*, 63 id. 132.) If the deed contained a clause stating that it was subject to the option agreement, a different situation might exist, for the

reason that the appellant would not acquire any better title than the Barclay Corporation had.

The order appealed from should be modified to the extent of requiring plaintiff to state what the alleged "valuable consideration" of plaintiff's option was, and when and where such valuable consideration was given to the Guardian Holding Co., Inc., and as thus modified affirmed, with ten dollars costs and disbursements to the appellant.

CLARKE, P. J., DOWLING and SMITH, JJ., concur; PAGE, J., dissents.

Order modified as stated in opinion, and as so modified affirmed, with ten dollars costs and disbursements to the appellant.

LIONEL HAGENAERS and ARMAND BATTA, Partners Doing Business under the Firm Name of LIONEL HAGENAERS & Co., Appellants, Respondents, v. LUCAS CABALLERO and Others, Individually and as Surviving Partners of the Firm of CABALLERO HERMANOS, Respondents, Impleaded with JULIO C. CABALLERO, Respondent, Appellant.

First Department, March 4, 1921.

Pleadings — action to recover money paid in honoring drafts — demurrer to defense based on foreign laws properly overruled — demurrer to defense of usury sustained — demurrer to defense to two causes of action sustained where defense partial — demurrer to counterclaim sustained — demurrer to defense of lack of parties sustained.

In an action based upon a *quasi* contract for the repayment of money paid at the city of New York at the request of the defendants in honoring their drafts, one of the defenses alleged facts showing a course of dealing with parties of a foreign country and that the drafts had been carried into a current account. The defense further alleged that the rights of the parties should be determined by the laws of the foreign country. *Held*, that a demurrer to such defense was properly overruled.

A demurrer to an answer setting up usury is properly sustained where the allegations do not show that the contract was made in the State of New York, or in fact where it was made.

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A demurrer is properly sustained which is directed to an answer setting up matters which are a defense to two causes of action, one brought for reimbursement of money paid and the other on an account stated, and which also sets up a counterclaim, where such defense is at best partial.

A counterclaim in which the defendant asks for an accounting upon an allegation that non-resident third parties have failed to account to the defendant for securities and merchandise forwarded to them would in effect be an equitable counterclaim, the allowance of which would require the presence of persons not parties to the action, and a demurrer thereto is properly sustained.

A demurrer to a defense based on the theory that there is a lack of parties plaintiff is properly sustained where it is not alleged that the additional parties are within the jurisdiction of the court.

APPEAL by the plaintiffs, Lionel Hagenaers and another, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of June, 1920, as overrules their demurrer to the first separate and distinct defense to the first cause of action alleged in the complaint, and the demurrer to the separate and distinct defense to both the first and second causes of action embodied in paragraphs XXI and XXII of the amended answer.

Appeal by the defendant, Julio C. Caballero, from so much of said order as sustained the demurrers interposed by plaintiff to the second separate and distinct defense to both causes of action, alleged in paragraphs XXIII to XXVII, inclusive, of the amended answer and to the counterclaim contained in the same paragraphs of the amended answer and under which it also sustained the demurrer to the third separate and distinct defense to the first and second causes of action contained in paragraphs XXVIII and XXIX.

Clarence DeWitt Rogers of counsel [*William R. Brinckerhoff*, attorney], for the plaintiffs.

John Patrick Walsh of counsel [*Walsh & Young*, attorneys], for the defendant Julio C. Caballero.

GREENBAUM, J.:

The first cause of action is based upon a quasi contract for the repayment of money paid at the city of New York at the request of the defendants in honoring their drafts, there being no funds in the hands of the drawees. The defense

after alleging a course of business that had arisen between the defendants, of Colombia, South America, as exporters, and Pinto, Leite & Nephews of London, England, and Lionel Hagenas & Co., assignors, as factors and bankers, alleges as follows:

"XIV. * * * That upon and after the cancellation of the mortgages mentioned in paragraph XIII of this answer, a course of business in respect to current account, drafts and produce, which had theretofore become established between Caballero Hermanos, Pinto, Leite and Nephews, and Lionel Hagenas & Co. was continued between the same parties to a time later than November 18th, 1912; and that the drafts which are described by numbers and amounts in the list marked Exhibit 4 and attached to the complaint herein are only a part of the drafts which were drawn during the period commencing September 1st, 1911, and ending November 18th, 1912, and that all of them, as well as many other drafts which are not included in said Exhibit 4 * * * were carried into the current account * * * and * * * were included in and charged against the defendants in this action and Carlos A. Caballero upon statements of said current account rendered to them by the aforesaid firm of Lionel Hagenas & Co.; * * * that there was no formal reservation of rights by the plaintiffs or Pinto, Leite and Nephews or Lionel Hagenas & Co. when the said drafts were included in the said account current."

The defense then alleges that the rights of the parties were determinable under the laws of the Republic of Colombia which are set forth in the Spanish language and translated into English as follows:

"Art. 735. The admission into current account of amounts previously due from one of the contracting parties to the other, however arising, produces a novation, unless the creditor or the debtor, when giving consent to their being put in current account, makes a formal reservation of his rights. Without an express reservation having been made, the admission of an amount into current account is presumed to have been made entirely and absolutely. The novation extinguishes in some cases the right of a third party to regain possession of values which have been passed into current account.

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" Art. 736. Values transmitted and received in current account are not applicable to the partial payment of items that are included in the account, nor are they recoverable during the running of the account."

Plaintiffs, appellants, claim, however, that the cause of action is not upon the drafts, but upon the quasi contract for reimbursement for moneys paid at the request of the defendants by their drafts, and that the rights of the parties must be determined by the law of the place where the payment was made, to wit, New York. We are inclined to think that the court was right in overruling this demurrer inasmuch as we must assume that there was a current account between the parties in which these items were included and that the parties acted under an agreement which was made in Colombia. Under such circumstances the rights of the parties should be reserved for the consideration of the trial court, which after the evidence is all in, would be in a position to determine whether the alleged contract is to be interpreted under the laws of Colombia or those of this State.

With respect to the demurrer to the defense in paragraphs XXI and XXII of the answer which purports to set up the plea of usury under the laws of this State, it would be sufficient to say that the allegations do not show that the contract was made in New York. Indeed it does not allege where the contract was made. The defense of usury should set forth the agreement upon which the alleged usury is predicated and where the agreement was made. We are of the opinion that the learned Special Term justice erred in overruling the demurrer to this defense and that it should have been sustained.

As to the appeal of the defendant, we are of the opinion that the court properly sustained the demurrer to the defense alleged in paragraphs XXIII *et seq.* That defense set up that there were errors in the account stated, pleaded in the second cause of action. The defense, however, is a defense to both causes of action, and it also sets up a counterclaim on the same state of facts. It is difficult to see how the facts pleaded in those paragraphs would be a defense to the first cause of action which is brought for reimbursement of moneys paid. The plaintiffs are limited to proof on that issue. If they fail they cannot recover. If the claim comes within the Colom-

bian law applicable to accounts current, which is contained in a previous defense, the plaintiffs cannot recover. The second cause of action is on an account stated. If defendant seeks to attack such an account it would be necessary to surcharge and falsify it by alleging the incorrect items thereof. Besides, such a defense would be a partial and not a complete defense as set up by the defendants.

We are also of the opinion that the court properly sustained the demurrer to the counterclaim alleged in the paragraphs which have just been considered. As a counterclaim defendant asks for an accounting upon the allegation that Pinto, Leite & Nephews have failed and neglected to truly account to the defendants for the disposition of merchandise and securities forwarded to them as therein alleged. This would be allowing an equitable counterclaim which would require the presence of persons who are not parties to this action. Before that may be done it would be necessary to bring an independent action citing all the parties in interest in the transaction, who are obliged to account.

There only remains to consider the demurrer to the defense alleged in paragraphs XXVIII *et seq.* This defense is based upon the theory that there is a lack of parties plaintiff. The difficulty with such a defense is that it is not alleged that the additional parties are within the jurisdiction of the court. These additional parties are Pinto, Leite and Nephews, who are described in the papers as being residents of England. It has been held in *Mittendorf v. N. Y. & H. R. R. Co.* (58 App. Div. 260) that it must appear that the additional parties are within the jurisdiction of the court, otherwise the plea is of no value.

We are inclined to think that the court was right in sustaining the demurrer.

It follows that so far as defendant's appeal is concerned the order should be affirmed, with ten dollars costs and disbursements. As to the plaintiffs' appeal the order should be reversed by sustaining the demurrer to the defense contained in paragraphs XXI and XXII of the amended answer and in other respects affirmed, without costs to either party, with leave to plaintiffs to withdraw demurrer to the first defense to the first cause of action, contained in paragraphs IX to XV,

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inclusive, of the amended answer, within twenty days from service of the order to be entered hereon with notice of entry thereof.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ.,
concur.

On defendant's appeal, order so far as appealed from affirmed, with ten dollars costs and disbursements to plaintiffs. On plaintiffs' appeal, order reversed so far as indicated in opinion and in other respects affirmed, without costs, with leave to plaintiffs to withdraw demurrer as indicated in opinion.

ANGELE INGLESLI, Respondent, v. HICKSON, INC., Appellant.

First Department, March 4, 1921.

Master and servant — wrongful discharge — when damages limited to recovery of salary earned and unpaid — demurrer properly overruled to count of complaint alleging wrongful discharge without notice — construction of contract to send employee abroad.

In an action for damages for a wrongful discharge a count in the complaint which merely alleges a wrongful discharge and that there is due a sum certain for unpaid salary, limits the recovery to the salary earned and unpaid.

Where, however, a second count realleges, by reference, the matter set up in the first count, and further alleges damages for the failure to send the plaintiff abroad, in accordance with the terms of the contract, and it appears that the contract might be terminated by either party at the expiration of the first year, by giving thirty days' notice, and there is still sufficient time to give the notice after the alleged wrongful discharge, the plaintiff would presumptively be entitled to recover as damages the balance of salary for the unexpired year only, and, hence, a demurrer to the count was properly overruled.

A contract between a millinery establishment and a designer that the latter should make two trips to Europe in the interest of the establishment, at such times during the life of the contract as it might deem most advantageous to its business, gives rise to no right of action in her favor for more than nominal damages, where such part of the contract is not carried out by the employer.

MERRELL, J., dissents in part, with opinion.

APPEAL by the defendant, Hickson, Inc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of July, 1920, overruling the demurrer to the second cause of action set forth in the amended complaint.

The issue herein was brought on and tried as a contested motion under section 976 of the Code of Civil Procedure.

Sidney M. Heimann [*William Klein* and *Milton R. Weinberger* with him on the brief; *William Klein*, attorney], for the appellant.

Raymond C. Haff of counsel [*Harry W. McChesney* with him on the brief; *Hovell, McChesney & Clarkson*, attorneys], for the respondent.

LAUGHLIN, J.:

The sole ground of the demurrer is that the second count of the complaint fails to state facts sufficient to constitute a cause of action. Both counts are for damages for breaches of a contract in writing made between the parties on the 27th of January, 1919, by which defendant, a domestic corporation engaged in the city of New York in the manufacture and sale of fashionable millinery, employed plaintiff as chief designer in its millinery department for the period of two years commencing on the 10th day of March, 1919, at a salary of \$150 per week, payable at the end of each week. In the first count it is alleged that defendant wrongfully and without cause discharged plaintiff on the 20th of January, 1920, and that there was then due and owing to the plaintiff for unpaid weekly salary the sum of \$900. The second count, to which the demurrer was interposed, is for \$10,000 damages predicated on the wrongful discharge, which is realleged by reference in the second count, and for the failure of the defendant to send the plaintiff to Europe on its business in accordance with the provisions of the 4th paragraph of the contract, which are as follows:

"The party of the second part further agrees that the party of the first part shall take two trips to Europe in the interest of the party of the second part, at such times during each year most advantageous to the business of the party of the

second part; and the party of the second part agrees to pay all necessary expenses to the party of the first part for said European trips, and to advance to the party of the first part sufficient amount of money to cover said travelling expenses, in first class style, in advance of such trips; the complete expense of such trips to be adjusted upon the return to the City of New York, of the party of the first part."

It will be observed that although a wrongful discharge is alleged in the first count, no damages are therein sought to be recovered therefor and the recovery thereunder is limited to the weekly salary earned and unpaid. By realleging the wrongful discharge in the second count, a cause of action for the wrongful discharge is stated, which, if the evidence shows a wrongful discharge, will entitle plaintiff presumptively, unless the defendant shows that she could and should have obtained other similar employment to reduce the damages, to recover as damages the balance of the weekly salary for the unexpired part of the first year only, for the contract provided that it might be canceled by either party at the expiration of one year upon the giving of thirty days' notice in writing and there was still sufficient time to give that notice after the alleged wrongful discharge. The demurrer was, therefore, properly overruled. The appeal, however, has not been argued on that theory. It has been assumed by both parties that the appeal involves the construction of the 4th paragraph of the contract; and it is argued on behalf of the appellant that the alleged violation thereof affords no cause of action and on behalf of the respondent that she is entitled to recover general damages in such amounts as the jury may find she has sustained by being deprived of the opportunity of advancing her knowledge and acquaintance with respect to the millinery business by the contemplated trips to Europe. I am unable to concur in the view that the plaintiff is entitled to recover damages under said paragraph 4 of the contract for the failure of the defendant to send her to Europe. The contention made in behalf of the plaintiff is that the provisions of the 4th paragraph of the contract were inserted for her benefit in order to enable her to become more efficient and that she has sustained large damages by having been deprived of the opportunity of making the two trips to Europe. The only

possible basis for this contention lies in the form of the agreement by which the defendant agreed that the plaintiff should take two trips to Europe. It is not provided that the trips shall be taken for her education or information or benefit, but on the contrary it is therein expressly provided that those trips were to be taken *in the interest of the defendant* and at such times during each year as the defendant might deem most advantageous to its business and that the plaintiff was to receive no additional compensation therefor and was to be paid only her necessary expenses which were to be estimated and advanced and the settlement therefor made on her return. If the contract contained no provision requiring plaintiff to go to Europe on defendant's business, it would have no right to send her there against her will. In view of the fact that it is expressly provided in the contract that the trips were to be made in the interest of the defendant, I am of opinion that the contract should be construed as merely intended to obligate plaintiff to make two trips if and when called upon so to do by the defendant and upon the advancement of an amount sufficient to cover her expenses. At most, it was a privilege which defendant agreed in its own interest to give to the plaintiff instead of employing another to make the trips if its business required them, and for the breach thereof there could in no event be a recovery by the plaintiff for more than nominal damages. Unless there was a wrongful discharge, there was in no event any obligation on the part of the defendant to send plaintiff to Europe, and if the discharge was wrongful she is entitled to recover damages therefor, and there would be no occasion for considering whether, in addition thereto, she might be entitled to nominal damages for a technical breach of the 4th paragraph of the contract. Contracts must be construed reasonably; and under that rule this contract should not be construed as obligating the defendant to send the plaintiff to Europe if, owing to a change of circumstances and business conditions, that would not be to the interest of the defendant. It would, I think, be an unreasonable construction of these provisions to hold that the defendant thereby undertook to afford plaintiff an opportunity for becoming more efficient as a designer of millinery at its expense. Since, however, the second count sufficiently states a cause of action

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for damages for a wrongful discharge, the order was right and should be affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw the demurrer upon payment of costs and disbursements, and serve an answer.

CLARKE, P. J., SMITH and PAGE, JJ., concur.

MERRELL, J.:

The plaintiff, according to the allegations of the amended complaint, is a millinery designer. The defendant is a domestic corporation engaged in the manufacture and sale of fashionable millinery in the city of New York. In said complaint it is alleged that on or about January 27, 1919, the plaintiff and the defendant entered into a contract in writing, by the terms of which the plaintiff agreed to enter into the service of the defendant, and the defendant agreed to employ the plaintiff, as chief designer of its millinery department for the period of two years, commencing on the 10th day of March, 1919, at a weekly salary of \$150, payable at the end of each and every week, together with certain expenses mentioned in said contract. Under the terms of the contract, the defendant, party of the second part, agreed that the plaintiff, party of the first part, should have at least four weeks' vacation, with pay, in each year, and by the 6th clause thereof it was mutually agreed that either of the parties might upon thirty days' notice in writing cancel the agreement at the expiration of one year of said term, if either was in any way dissatisfied with the other party or the business or work being done by said other party. A further provision was contained in the contract forbidding the plaintiff from entering the employ of any other millinery establishment in the city of New York or in the city of Boston, Mass., before the expiration of the term of said agreement, or before the cancellation thereof upon said thirty days' notice. The contract also contained the following provision:

"*Fourth.* The party of the second part further agrees that the party of the first part shall take two trips to Europe in the interest of the party of the second part, at such times during each year most advantageous to the business of the party of the second part; and the party of the second part agrees to pay all necessary expenses to the party of the first part for said

European trips, and to advance to the party of the first part sufficient amount of money to cover said travelling expenses, in first class style, in advance of such trips; the complete expense of such trips to be adjusted upon the return to the City of New York, of the party of the first part."

In her first cause of action contained in said amended complaint, the plaintiff alleged that on the 10th day of March, 1919, the plaintiff entered the defendant's service as chief designer in its millinery department, and duly performed all the terms and conditions of said agreement on her part to be performed, until on or about the 19th day of January, 1920, and that said defendant broke said contract and unlawfully and without any right or cause discharged the plaintiff from its said employment and refused to permit the plaintiff to perform any further services for it under said agreement. In said first cause of action the plaintiff then alleges that at the time of her wrongful discharge there had become due the plaintiff under the terms of said agreement from the defendant as weekly wages the sum of \$6,750 on account of which the defendant had paid the plaintiff the sum of \$5,850, leaving a balance remaining unpaid of weekly wages due the plaintiff at the time of such discharge of \$900, no part of which had been paid.

As a second cause of action in said amended complaint, the plaintiff first repeats and realleges as a part of said second cause of action "each and every allegation contained in paragraphs numbered 'First,' 'Second' and 'Third' of the foregoing first cause of action." The 1st, 2d and 3d paragraphs contained in the first cause of action relate respectively to the incorporation and business of the defendant, the contract of employment entered into between the plaintiff and the defendant, and its breach by the defendant's wrongfully discharging the plaintiff from its employ on January 20, 1920, and defendant's refusal to permit plaintiff to perform further services under said agreement. Then by the "second" paragraph of said second cause of action contained in the amended complaint the plaintiff alleges that at and prior to the time said agreement was made and entered into, the plaintiff was and now is an artist in millinery designing, and had devoted years of time and spent large sums of money in studying

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art and millinery designing in Paris and other European cities to become a proficient millinery designer; that at the time said agreement was entered into the plaintiff and the defendant well knew and understood that it was the custom and that it was necessary for a millinery designer in charge of the designing department of a manufacturer of fashionable millinery in the city of New York, to make two trips to Europe each year for the purpose of procuring ideas and designs to maintain her efficiency as a designer of millinery for the fashionable trade in New York city and elsewhere in the United States, and the provision in said agreement that the plaintiff should take two trips to Europe in the interests of the party of the second part at such times during each year most advantageous to the business of the defendant, and that the defendant would pay all necessary expenses to the plaintiff for said European trips, and advance a sufficient amount of money to cover traveling expenses in first class style in advance of such trips, was a part of the contract to be performed by the defendant for the benefit of the plaintiff, and was made in order that the plaintiff might visit the principal manufacturers and creators of fashionable millinery in Paris and other European cities for the purpose of procuring the latest ideas and designs of fashionable millinery in Paris and other European cities, so as to maintain her efficiency as a millinery designer for the fashionable trade in New York city and elsewhere in the United States. And by the "third" paragraph of said second cause of action in the amended complaint the plaintiff alleges that the defendant neglected and failed to send, and refused to permit or allow the plaintiff to take two trips to Europe in the interest of the defendant, and to pay all the necessary expenses of the plaintiff for said European trips, and to advance to the plaintiff sufficient moneys to cover traveling expenses as required and provided by said agreement, and that by reason thereof the plaintiff was deprived and prevented from securing and procuring ideas and designs from milliners, manufacturers and creators of fashionable millinery in Paris and other European cities for use as chief designer in the millinery department of the business conducted by the defendant in the city of New York or elsewhere, and that the defendant well knew that in refus-

ing to permit and allow the plaintiff to take these trips to Europe in the interest of the defendant, it would thereby destroy or greatly impair the efficiency of the plaintiff as a millinery designer and the value of her services as a chief designer in the millinery department of any millinery business in the city of New York and elsewhere, and the efficiency of the plaintiff as a millinery designer was thereby greatly impaired and the value of her services as a chief designer in the millinery department of any millinery business in the city of New York and elsewhere was thereby destroyed. Finally, by the "fourth" paragraph of the second cause of action contained in said amended complaint, the plaintiff alleged: "That by reason of the premises the plaintiff has been damaged in the sum of \$10,000." Judgment is demanded against the defendant for the sum of \$10,900, together with the costs and disbursements of the action.

The defendant demurred to the second cause of action set forth in plaintiff's said amended complaint on the ground that it appeared on the face thereof that it did not state facts sufficient to constitute a cause of action. Thereupon said demurrer was brought on for hearing as a contested motion, and the order appealed from was made overruling said demurrer, with permission to the defendant to withdraw the same and serve an answer to said second cause of action contained in the amended complaint.

The appellant urges a reversal of the order upon the ground that the second cause of action set forth in said amended complaint does not, in fact, state facts sufficient to constitute a cause of action, the position of the defendant, appellant, being that under the 4th clause of the contract between the parties there can be no cause of action against the defendant for damages arising from her wrongful discharge because the defendant failed to send the plaintiff to Europe the two trips in each year provided in said clause. The position of the defendant is that it was entirely at the option of the defendant whether or not the plaintiff should take said two trips yearly to Europe, and that in case the defendant saw fit not to send her she could not complain. I think the plaintiff was entitled, as a part of the consideration of her entering defendant's employment, to the two trips to Europe annually under the

terms of said 4th clause of the contract. By that clause the party of the second part agreed that the party of the first part should take the two trips to Europe in each year. It is true that it is stated that said trips should be in the interest of the party of the second part, and should be taken at such times in each year as were most advantageous to the business of the said party of the second part. Nevertheless, I think the plaintiff had a right to insist that she have said two trips each year. Under the allegations of the complaint, which upon demurrer must be taken as admitted, the trips abroad were of distinct benefit to plaintiff and constituted a part of the consideration for plaintiff's engaging in defendant's employ. It will be noted that under the terms of the contract her employment was of two years' duration, and at the end of the first year, if dissatisfied with her work, the defendant was at liberty to discharge her. No one may have known better or better understood than she the necessity in order to maintain her efficiency and to obtain new designs in her art that the plaintiff make these frequent trips to Europe. It may very well be that the real cause of her discharge was the fact that she had not been able to maintain her efficiency as a designer for the very reason that she had been deprived of these European trips. It, therefore, would seem to be well within reason that the taking of such trips, while the same were to be taken in the interest of the party of the second part, were none the less to plaintiff's advantage. Under the allegations of the complaint, which we must take as true, it was customary and necessary for her, in order to maintain her efficiency, not only with reference to her present employment with the defendant, but also to maintain her reputation and ability as a designer, to keep constantly in touch with the European styles. Therefore, it was to her interest, as a part of her education and professional training and to enable her to keep abreast of the changing fashions, to make these frequent pilgrimages to the European center of fashion. As these European trips were to be taken when plaintiff was under pay of defendant and as the latter was to bear all expense of the trip, it was only natural that the contract should provide that such trips were to be taken "in the interest of" and at seasons of the year most

advantageous to the employer. But such provisions do not negative the fact as alleged in the complaint that such trips were a distinct advantage and necessary to enable plaintiff to maintain her professional standing and efficiency. These trips at defendant's expense may well have been a prime consideration for plaintiff's entering defendant's employ. The allegations of the complaint very fully set forth the advantage thereof to the plaintiff, and, indeed, the necessity thereof to enable plaintiff to maintain her efficiency as a designer of fashionable millinery, and upon demurrer the truth of such allegations must be deemed admitted. That the provision of the contract in question was clearly for the advantage of the plaintiff seems borne out by the fact that no such provision would have been necessary had the European trips been solely for the benefit of the employer. If such were the fact the contract would simply have provided that the plaintiff would go abroad if required by her employer. In other words there was no reason for including such a provision in the contract except to bind the employer to send the plaintiff abroad twice in each year and to defray all necessary expenses incidental to such trip.

I, therefore, think it was properly alleged as an element of her damage that she was wrongfully deprived of these trips which clearly under the 4th clause of the contract the defendant had agreed she should take.

But beyond all of this, it seems to me that by the second cause of action the plaintiff has clearly set forth facts sufficient to constitute a cause of action against the defendant. The only damages alleged in her first cause of action were to the extent of the unpaid salary which she had already earned at the time of her wrongful discharge. She might have claimed in that connection damages resulting from her wrongful discharge, measured by the salary which she would have received for the full term of her employment. Under the allegations of her complaint, plaintiff's cause of action arose at the time of defendant's breach of the contract, and she was entitled to sue and recover such actual damages as flowed from such breach. (*Everson v. Powers*, 89 N. Y. 527.) Damages may be estimated to the end of the contract period, even though the trial occurs before the end of such period. (*Davis*

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v. *Dodge*, 126 App. Div. 469; *Cottone v. Murray's*, 138 id. 874.) In her so-called second cause of action contained in the amended complaint, the plaintiff at the outset repeats and realleges as a part of said second cause of action the allegations contained in the first cause of action as to defendant's incorporation, the contract between the parties, and its breach by the defendant. Then she alleges the refusal of the defendant to send her abroad as provided in the 4th clause of the contract, and closes the allegations of her second cause of action with the allegation: "That by reason of the premises the plaintiff has been damaged in the sum of \$10,000." Such "premises" included all the necessary allegations upon which to base a demand for damages for wrongful discharge. In any aspect of the case the plaintiff, having been wrongfully discharged on January twentieth, before the expiration of her first year, and without the thirty days' notice provided in the contract, and without any dissatisfaction on the part of the defendant so far as the allegations of the complaint show, was entitled to her salary for the remainder of the first year. I think beyond this, inasmuch as the contract provided that her employment could only be terminated at the expiration of the first year where the defendant was dissatisfied with her work, and then only on thirty days' notice, and it not appearing that her discharge was in conformity with such provisions of the contract, that the plaintiff was entitled to recover her salary for the remainder of the full two years of her term. She was certainly entitled to recover some damages beyond the \$900 of unpaid salary which she had earned prior to her discharge, as alleged in her first cause of action, and, therefore, upon demurrer, the allegations of the second cause of action must be held to be good as stating a cause of action for some damages. The form of pleading adopted by the plaintiff wherein she repeated and realleged in her second cause of action all of the allegations contained in her first cause of action which were essential to a recovery of damages for wrongful discharge, was distinctly approved by this court in the recent case of *Hudson Trading Co. v. Durand* (194 App. Div. 248). In that case we held that the Special Term had properly overruled defendant's demurrer to a second cause of action for insufficiency where the plaintiff had in its com-

plaint set up an arbitration award which this court held to be void and not a proper basis for recovery, but had also in said second count realleged by reference, as in the present case, the allegations contained in the first count which stated a good cause of action.

The order appealed from should be affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw its demurrer and answer within twenty days upon payment of said costs and ten dollars costs of motion at Special Term.

Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term.

THEKLA F. HOFMANN, Respondent, v. LOUIS B. F. HOFMANN,
Appellant.

First Department, March 4, 1921.

Husband and wife — separation — complaint — allegation of adultery by husband insufficient as allegation of cruel and inhuman treatment — causes of action for divorce and separation cannot be united — adultery accompanied by other acts and conduct may constitute cruel and inhuman treatment.

A complaint which alleges a cause of action for a divorce on the ground of adultery but demands judgment for a separation cannot be sustained, for the mere allegation that the defendant has been guilty of adultery does not amount to an allegation of cruel and inhuman treatment of plaintiff by defendant or of such conduct on the part of the defendant toward the plaintiff as may render it unsafe and improper for the former to cohabit with the latter.

Hence, a complaint, which alleges in substance that the defendant after obtaining a foreign decree of divorce from the plaintiff which is null and void in this State remarried and returned to this State and lives in an adjoining county but within the same city and has informed people of the foreign decree and of the remarriage and has invited his children to "meet and affiliate with the said woman," fails to state facts sufficient to constitute a cause of action for a separation, although sufficient to constitute a cause of action for a divorce.

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Such a complaint cannot be treated as stating two causes of action, one for a divorce and the other for a separation, for they cannot be united in the same complaint.

It seems, that the outrageous and indecent conduct of the defendant in association with acts of adultery, as where the paramour is brought into the home, or where the husband boasts of his illicit relations to his wife, and especially if such boastings are in the presence of his children, may be sufficient to sustain an action for separation.

MERRELL, J., dissents, with opinion.

APPEAL by the defendant, Louis B. F. Hofmann, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of July, 1920, granting plaintiff's motion for judgment on the pleadings, consisting of the complaint and demurrer thereto, and overruling the demurrer to the complaint.

Joseph A. Seidman, for the appellant.

Franklin Taylor of counsel [*Joseph J. Zeiger* with him on the brief], for the respondent.

PAGE, J.:

The judgment demanded is a permanent separation. The facts alleged in the complaint, which are therein stated to have caused the plaintiff acute mental suffering and distress and to constitute the grounds of cruelty and inhuman treatment and improper conduct, relate entirely to the defendant's having obtained a decree of divorce from the plaintiff in the State of Pennsylvania, and caused the same to be served upon her, and thereafter contracted and entered into a marriage with another woman, with whom the defendant resided in the borough of The Bronx. It is alleged that the defendant has caused divers persons, including the children of the marriage between plaintiff and defendant, to be informed of the divorce and marriage and has represented to said children that they should meet and affiliate with the woman with whom he was living. It is alleged that the defendant did not secure a *bona fide* residence in Pennsylvania, and that process was not personally served on the plaintiff and that she did not appear in the action, by reason whereof the decree

was null and void; and that the defendant is living in adulterous intercourse with said woman.

The complaint states facts sufficient to constitute a cause of action for a divorce upon the ground of the defendant's adultery. (*Kaiser v. Kaiser*, 192 App. Div. 400.) It also states facts not necessary to such a cause of action, upon which is predicated a demand for a judgment of separation. We cannot treat this complaint as stating two causes of action, one for divorce and the other for a separation. These causes of action cannot be united in the same complaint. (*Zorn v. Zorn*, 38 Hun, 67; *Conrad v. Conrad*, 124 App. Div. 780.) In the case of *Johnson v. Johnson* (6 Johns. Ch. 163) the bill contained charges of adultery and of cruel and inhuman treatment. The question was submitted whether the charges could be united in the same bill and if they could not, whether the plaintiff might elect which charge to retain. Chancellor KENT held that as they were distinct and independent charges leading to distinct issues and decrees they could not be joined in the same bill. The reasons given by the chancellor, translated into the terms of our present practice, as there has been a change in form and terminology rather than of substance, are as follows: An answer to a charge of adultery may be unverified, but if the complaint is verified the answer to the charge of cruel usage must be verified. If the charge of adultery be denied, the court must, on the application of either party, or may of its own motion, direct a trial of that issue by a jury, but the issue as to cruel usage is to be tried by the court. If the adultery be confessed or if the defendant defaults in answer or upon the trial, still the evidence to support the charge must be taken, while if the defendant confesses the other charge or makes default, the admission is conclusive and judgment follows as of course. The judgments in the two cases are essentially different. In the one it is an absolute divorce, with a disability to the defendant to marry again; in the other the divorce is only *a mensa et thoro*, and may be for life or for a limited time, in the discretion of the court. "The two charges are thus inconsistent with each other, in respect to the mode of proceeding, and the remedy; and it leads to confusion, to connect them together in the same bill. The charge of adultery overpowers and

destroys the force and effect of the other charge, for the one remedy merges in the other."

A complaint which alleges a cause of action for a divorce on the ground of adultery, but demands judgment for a separation from bed and board, cannot be sustained. "For the mere allegation that the defendant has been guilty of adultery has never been held to amount to an allegation of cruel and inhuman treatment of plaintiff by defendant, or of such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the former to cohabit with the latter." (*Allen v. Allen*, 125 App. Div. 838.) Therefore, although this complaint states facts sufficient to constitute a cause of action for a divorce, it cannot be sustained as stating a cause of action for a separation unless facts are stated which would constitute such a cause of action. While the rule that to constitute cruel and inhuman treatment, physical mistreatment and bodily harm, or the reasonable fear thereof from violence are requisite, has been so extended that outrageous and inhuman treatment of the plaintiff by the defendant, which causes pain and mental suffering is sufficient, still the rule is based on the theory of bodily harm, the courts recognizing that to compel a wife to submit continually to such mistreatment would tend to affect the health as surely as would personal violence.

There are cases where the outrageous and indecent conduct of the defendant in association with acts of adultery has been held sufficient to sustain an action for a separation, as for instance where the husband brings his paramour into the home, or where he boasts to his wife of having committed acts of adultery, and especially if such boastings are in the presence of the children or others, and still insists on cohabiting with her. In the case under consideration, there is no allegation that the defendant has communicated directly or indirectly the fact of his remarriage or sought to impose upon the plaintiff an association with the woman with whom he was living, or that he has insisted on cohabiting with her or even returned to her. The allegations of the complaint are solely that the defendant obtained a decree of divorce from plaintiff, which must be presumed to have been valid according to the laws of the State where granted, and subsequently married.

As there is no allegation that the marriage took place in this State, it probably would be recognized as valid everywhere except in this State, where, for reasons of public policy, we have refused to recognize decrees of divorce entered in actions against citizens of this State unless jurisdiction was obtained by personal service of process upon the defendant within the foreign State or an authorized appearance for the defendant was entered in the action. The complaint further alleges that after obtaining such decree he returned to this State and lives in an adjoining county, but within the same city, and has informed people that he had obtained a divorce and had thereafter married the woman with whom he was living, and that he had invited his children to "meet and affiliate with the said woman." It is not alleged that he had tried to entice the children away from the plaintiff, or persuade them to live with him. The gravamen of the complaint is the adultery of the defendant; the other allegations are incidental thereto and a not unusual result of the varying divorce laws in our different States. In my opinion, the complaint fails to state facts sufficient to constitute a cause of action for a separation. The plaintiff must bring her action for the relief given her by statute. (See Code Civ. Proc. § 1762 *et seq.*)

The order should be reversed and the motion denied. As the defendant did not move for judgment, we cannot dispose of the issue of law.

CLARKE, P. J., LAUGHLIN and SMITH, JJ., concur; MERRELL, J., dissents.

MERRELL, J. (dissenting):

Defendant has appealed from an order overruling his demurrer to plaintiff's complaint and granting plaintiff's motion for judgment on the pleadings.

The parties are husband and wife, and the action is by the wife to procure a judgment separating the parties from bed and board forever by reason of the cruel and inhuman treatment of the plaintiff by the defendant and by reason of such conduct on the part of the defendant toward the plaintiff as renders it unsafe and improper for the defendant to cohabit with the plaintiff. The complaint alleges the marriage of the parties in the State of New York, where they then resided,

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and both still reside; that the issue of such marriage were a son and a daughter, aged twenty-seven and twenty-six years, respectively. The complaint then alleges that the defendant has treated the plaintiff in a cruel and inhuman manner and has been guilty of conduct making it unsafe and improper for her to live and cohabit with him. Specifically, as ground for the relief which she seeks herein, plaintiff alleges that the defendant, without the knowledge or consent of the plaintiff, and without the personal service of the summons upon her, obtained a decree of divorce in the State of Pennsylvania; that the court granting such decree obtained no jurisdiction of the plaintiff, and that said pretended action was wholly null and void; that plaintiff's first knowledge or information of said pretended decree of divorce was by the defendant causing her to receive by mail in the city of New York a certified copy thereof, on or about November 12, 1919; that the defendant, without being divorced from plaintiff, has contracted and entered into another marriage with a woman other than plaintiff, and is living in adulterous intercourse with said woman in the city of New York, and that the defendant has caused divers persons, including the children of the parties, to be informed of the pretended decree of divorce, and of the pretended marriage of the defendant to the aforesaid woman and of his living with her, and that the defendant has represented to the children of the parties that they should meet and affiliate with the said woman with whom the defendant is living. The complaint then states: "That the aforesaid acts of the defendant have caused the plaintiff acute mental suffering and distress and constitute the grounds of cruelty and inhuman treatment and improper conduct above alleged." But one cause of action is alleged in the complaint, and but one relief demanded, viz., that the plaintiff may forever be separated from the bed and board of the defendant.

The appellant contends that the facts in the complaint would not sustain a finding that the defendant is guilty of cruel and inhuman treatment, or of such conduct as renders it unsafe and improper for plaintiff to live with him. While the complaint does not specifically allege that the acts complained of have caused the plaintiff any ill health or bodily

suffering, nevertheless, the facts stated in the complaint show a course of conduct on the part of the defendant which would not only affect the health of a normal woman, but are such as to render it highly improper, if not impossible, for the defendant longer to cohabit with the plaintiff.

The defendant, appellant, relies upon the cases of *Zorn v. Zorn* (38 Hun, 67) and *Allen v. Allen* (125 App. Div. 838) in support of his contention that the complaint does not set forth a good cause of action for separation. In *Zorn v. Zorn* the ground of the demurrer was a misjoinder of causes of action and the court decided that a cause of action for divorce could not be joined with a cause of action for a separation. In *Allen v. Allen* the complaint set forth two separate causes of action, one for divorce on the ground of adultery, and the second for a separation on the ground of cruelty. An answer was interposed and a motion was made to strike out such answer as frivolous. Upon plaintiff's motion, at Special Term, the defendant's answer was stricken out. An appeal was taken and it was held that the answer was not frivolous. Two opinions were written in the Appellate Division. The prevailing opinion was written by Mr. Justice SCOTT, and the dissenting opinion by Mr. Justice McLAUGHLIN. In both these opinions the sufficiency of the complaint was considered, although the complaint was in nowise before the court. A majority of the court held that a cause of action for a divorce and a cause of action for a separation could not be joined in one complaint. Mr. Justice McLAUGHLIN, dissenting therefrom, was of the opinion that the two causes of action were not inconsistent, and that under the allegations contained in the complaint, proof would be admissible to establish that the defendant's conduct constituted "cruel and inhuman treatment of such a character as to render it unsafe and improper for the plaintiff to longer cohabit with him." The learned justice then said: "I cannot conceive of any more cruel and inhuman treatment to a highly sensitive, educated and moral woman than open and notorious acts of adultery on the part of the husband. What act could be more humiliating or likely to affect the health of such a person than that the husband should insist upon keeping his mistress in the home, or that he should frequently be seen in public

with her? Such acts to many women would be more cruel and do more to impair their health than threats or physical injury."

The complaint before us does not state two separate causes of action, nor does it ask for an absolute divorce. Therefore, the rule laid down in *Zorn v. Zorn* is not controlling here, but this complaint would seem to fall directly within the language used by Mr. Justice McLAUGHLIN in his dissenting opinion in *Allen v. Allen* (*supra*). Neither of the above cases is authority for holding that acts of adultery cannot be set forth in a complaint in an action for a separation, together with other facts which are claimed by the plaintiff to constitute cruelty, or such conduct on the part of the defendant as renders it unsafe and improper for the defendant to cohabit with the plaintiff. Nor do I know of any good reason for holding that an allegation of adultery is inconsistent with an allegation of cruelty. A brief review of the law respecting divorce and separation may be helpful in determining the question here involved.

Prior to the enactment of chapter 69 of the laws of the State of New York passed in 1787, conferring jurisdiction upon the courts of this State to grant a judicial decree of divorce on the ground of adultery, it had been, for centuries, the common law of England, adopted by our colonies, that acts of adultery and cruelty were the only causes for granting a divorce *a mensa et thoro*. In England this limited decree of divorce was commonly spoken of as a "divorce," although it is now known in our jurisprudence as a separation. Up to 1787 there was no judicial tribunal in the Colony or the State of New York which had any jurisdiction to grant a decree, either of separation or divorce, although by the common law, up to that time, adultery was the main ground for a separation. In England the ecclesiastical courts had exclusive jurisdiction to grant a judicial decree of divorce and such decree was limited by such courts to a judgment *a mensa et thoro*. For many years eminent authorities had contended that the course pursued in England by the ecclesiastical courts was highly improper in that countless women were turned loose upon society without husbands, and without the right to remarry, thereby indirectly bringing about the birth of illegitimate

children, where otherwise parties could remarry and thus maintain a proper social status. Our Legislature, by act passed March 30, 1787, first gave to the courts jurisdiction to grant a decree of absolute divorce through "An Act directing a mode of trial, and allowing of divorces in cases of adultery." The statute then enacted established a procedure in case of the commission of adultery by an inhabitant of this State, whereby in case such adultery was established, the chancellor was empowered "by sentence or decree" to pronounce a marriage dissolved, and both parties thereto freed from the obligations of the same, preserving the legitimacy of the children of such union, and providing for the care and maintenance of the children (if any) of said marriage, and also for the maintenance of the wife or for an allowance to her and for the security to be given therefor. The act further prohibited the subsequent marriage of a party convicted of adultery, but permitted the other party to remarry, as though the adulterer were actually dead. Later, by the Revised Laws of 1813 and by the Revised Statutes of 1830, our laws respecting a judicial divorce were amended and our courts were given jurisdiction to grant a separation for cruelty and such other causes as are now embraced within section 1762 of the Code of Civil Procedure. (See R. L. of 1813, chap. 102, § 10 *et seq.*; 2 R. L. 200, § 10 *et seq.*; R. S. pt. 2, chap. 8, tit. 1, § 50 *et seq.*; 2 R. S. 146, § 50 *et seq.*)

It will thus be seen that from time immemorial adultery has been considered the greatest offense against the marriage relation (1 Bishop Marr., Div. & Sep. § 1495), and such offense has been the main and practically the only ground for granting a decree of divorce or separation. Such being the case, I can see no inconsistency nor impropriety in pleading such an act along with other facts which are claimed to constitute cruel and inhuman treatment, or such treatment or course of conduct on the part of the defendant as renders a continuance of the marital relation intolerable. Moreover, section 1762 of the Code of Civil Procedure has been most liberally interpreted by the courts. It has been held that bringing loose women into the home is an act of cruelty, that accusations on the part of either party to the marriage that the other is guilty of adultery, especially when made in public, render a

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continuance of the marital relation impossible and warrant the court granting a decree of separation. (*Tower v. Tower*, 134 App. Div. 670; *Kinsey v. Kinsey*, 124 N. Y. Supp. 30.) It was formerly the law that either violence or threats of physical injury must be alleged. The rule has now, however, been extended to include such conduct as would reasonably be expected to cause such mental agony as would affect the health. As is said in Bishop on Marriage, Divorce and Separation (Vol. 1, § 1551), quoting from a case there cited: "We are possessed of social, moral and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight,—then we think that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief."

And, further (in § 1559) the learned author says: "As already seen, it was an old idea that mental suffering had nothing to do with bodily ills; at least, that it did not so directly create them as to render the infliction of it cruelty. * * *

"§ 1563. Under more enlightened psysiological views, the legal doctrine has become settled, it is believed everywhere, that conduct which produces pain of mind is legal cruelty; so that whenever, operating either alone or in combination with something else, it creates a danger to the physical health, a divorce for it or the combination will be justifiable."

There are many cases in which the rule above stated has been applied. (*Lutz v. Lutz*, 9 N. Y. Supp. 858; *Atherton v. Atherton*, 82 Hun, 179; *affd.*, 155 N. Y. 129; *Bihin v. Bihin*, 17 Abb. Pr. 19; *Straus v. Straus*, 67 Hun, 492; *Waltermire v. Waltermire*, 110 N. Y. 183.) Such being the rule, it seems inconsistent that threats and accusations of infidelity should be held to constitute a good cause for a separation, while open and continuous acts of adultery may not properly be alleged with other facts in a complaint in an action for like relief. In the complaint in the case at bar it is alleged that the defendant caused plaintiff to be served with a certified copy of a spurious decree of divorce; that said defendant is living in open adultery; is representing to the public that he

has divorced the plaintiff, when he has not; and has endeavored to induce the children of the marriage to affiliate with the woman with whom he is now living. It is difficult to see how any act on the part of the defendant could be more cruel than those mentioned. Certainly, such acts, if true, and, on demurrer, we must assume them to be true, render it impossible for the defendant to live or cohabit with the plaintiff. It has been held in several cases that where the husband is accustomed to consort with lewd women, such fact constitutes such improper conduct as to warrant the wife leaving him, and makes the continuance of the marital relation intolerable. (*Bennett v. Smith*, 21 Barb. 439.) In that case the learned justice who wrote the opinion says, in referring to the conduct of the husband respecting the charge of illicit intercourse: "Her husband, if what was offered to be proved in regard to his habits and conduct was true, was entirely unworthy of, and unfit for, the society of a virtuous woman." In *Sykes v. Halstead* (1 Sand. 483) the chief judge said: "The defendant in this case had given just cause to his wife for a separation. He had been guilty of adultery of a gross character."

In the case of *Horwood v. Heffer* (3 Taunt. 421) it was held that although the acts of the husband created no apprehension for the personal safety of the wife, still the husband had treated her "with great cruelty" for the reason that he had brought a profligate woman into the house. The case of *Horwood v. Heffer* is quoted with approval by Chief Justice BRONSON in *Blowers v. Sturtevant* (4 Den. 46).

Moreover, the Code of Civil Procedure (§ 1770) now permits such acts of adultery to be set up as a counterclaim in either form of action, and adultery is also a defense to an action for a separation. (Code Civ. Proc. § 1765; *Hawkins v. Hawkins*, 193 N. Y. 409.) It, therefore, seems illogical that a charge of adultery cannot be alleged in a complaint for a separation, along with other facts and items of misconduct, in order to show cruelty or such conduct as renders a continuance of the marital relation improper. The true rule, it seems to me, is as above indicated, that the plaintiff may set up all of various acts of defendant's misconduct that the court may determine from all of the surrounding facts and circumstances whether the conduct of the defendant constitutes cruelty, or

is, at least, so offensive and improper as to practically destroy the marital relation. As was said by Mr. Justice BETTS in *Murdock v. Murdock* (148 App. Div. 564) in his opinion (at p. 569): "It may be laid down as a general rule in such actions that a picture of the previous married life of the parties is essential to an intelligent and fair conclusion as to the effect which ought to be given to proof of a particular act of cruelty on the part of the husband.' So I think in this case everything pertaining to the married life of the parties was essential to be brought out so that the court might be put in possession of the fullest information in order to frame the decree which ultimately would be granted."

As this question comes to this court on a demurrer to the complaint, I do not think that the court can hold as a matter of law that the complaint does not set forth a good cause of action. It is to be assumed that the plaintiff is a normal person, ordinarily sensitive, and of good character, and that the acts on the part of the husband, as alleged in the complaint, have caused her great mental suffering and anguish, as she has alleged. It is clear that, if the acts complained of are true, it is no longer possible for the plaintiff to cohabit with the defendant, nor does it appear that either party is desirous so to do. The defendant is living in open adulterous intercourse with another woman, and is apparently endeavoring to bring the children of the marriage into his present place of abode, and to create a friendship between them and the woman who has taken their mother's place. Such acts, I think, within the cases, can well be said to constitute a good cause of action for a separation. Certainly it cannot be said as a matter of law that they do not.

It is true that this court has held that a cause of action for a divorce on the ground of adultery and a cause of action for a separation on the ground of cruelty cannot be joined in the same complaint in two counts which ask for relief upon both grounds. (*Conrad v. Conrad*, 124 App. Div. 780.) But as above shown, it does not necessarily follow that when allegations of adultery are contained in a complaint in an action for a separation, *along with other facts which are claimed to constitute cruelty*, the complaint does not state a good cause of action for a separation.

In the case at bar only one remedy is sought, to wit, a separation, and the plaintiff has simply alleged the fact that the defendant is living in open adultery as one of the facts which, on her theory, constitutes cruelty or such conduct as renders it unsafe and improper for her to cohabit longer with the defendant. I find nothing in the Code of Civil Procedure or in any of the adjudicated cases which prevents the plaintiff in an action for a separation from setting forth all of the defendant's acts which are an offense against the marriage, including his adultery.

Aside from the allegations of defendant's infidelity, the complaint states facts amply sufficient to constitute a cause of action for a limited divorce. Coupled with the allegation of defendant's procurement of the spurious Pennsylvania divorce, his causing plaintiff to be served with a certified copy of the bogus decree which he had obtained, his subsequent pretended marriage to and adulterous intercourse with another woman, and his advertisement that he was divorced and had remarried, is the no less important allegation of the complaint that defendant had represented to plaintiff's and his own son and daughter that they should meet and affiliate with the woman with whom he was having illicit relations. It is difficult to conceive of a form of cruelty more fiendish or more apt to bring acute mental anguish to a sensitive mother than to have her husband — the father of their children — seek to establish in their affections another woman in the mother's place. The fact that the son and daughter of the parties have arrived at years of maturity does not lessen, but, rather, increases, the gravity of the offense. At no time is the mother more entitled to the affection and respect of her offspring than when, her long vigil ended, they have come to years of understanding. The husband who seeks to divert from a mother that meed of recompense for long years of unselfish care and devotion is guilty of a cruelty in comparison to which the physical tortures of the rack or the thumbscrew of medieval days were insignificant. Nothing could tend more to destroy the health and happiness of plaintiff or render it more unsafe and improper for the defendant to longer cohabit with her than the conduct of the former as alleged in the complaint, and admitted by the demurrer to be true.

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The demurrer was properly overruled, and plaintiff's motion for judgment upon the pleadings was properly granted.

The order appealed from should be affirmed, with ten dollars costs and disbursements to the respondent.

Order reversed and motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of ELIZABETH O'SULLIVAN, Respondent, for Compensation under the Workmen's Compensation Law for the Death of Her Husband, FLORENCE O'SULLIVAN, v. A. H. WOODS THEATRE COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.

Third Department, March 2, 1921.

Workmen's Compensation Law — accidental injury or death — absence of eye witness — statements of employee found in dying condition confirmed by physical facts — hemiplegia — when hospital records not evidence of treatment for — nature of evidence in death cases.

Where a watchman, employed by a theatre company and found in the theatre on Sunday morning in a dying condition with an abrasion on his head, stated that he had just fallen from the stage, and it appeared that when he entered the theatre a few hours before he was in good condition; that the front of the stage had been freshly shellacked; that after the alleged fall the footlights were found to be broken near where a little ladder came to the stage, and the first two chairs below the stage were broken, tipped back and pulled from the concrete floor, the statements of the dying man confirmed by physical facts justified a finding that death resulted from the accident.

In such case hospital records showing that deceased was treated for hemiplegia are insufficient to prove that probably deceased's injury was due to a similar attack, where the hospital authorities could not give any satisfactory account as to how the records were made, but stated that they were made up from information acquired almost any way and from what they were told.

In death cases the same quality of evidence as to the conduct of the deceased is not required as in a case where he is alive and can take the stand.

APPEAL by the defendants, A. H. Woods Theatre Company and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 6th day of October, 1919, and also from a decision and award of said Commission made on the 4th day of June, 1920.

William Warren Dimmick, for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

JOHN M. KELLOGG, P. J.:

The employer maintained and cared for the theatre building in which the accident occurred. The entertainments at the theatre were staged principally by its president, A. H. Woods, upon his own account, he giving to the theatre company fifty per cent of the gross receipts of each entertainment, the latter to maintain the building, heat, light and clean it and furnish the ushers, doorkeepers, ticket sellers and attendants. The deceased employee was employed by the theatre company, the appellant, as a stage doorman, and on Sundays he acted as watchman. His hours were from seven A. M. to seven P. M., and he sustained his injuries Sunday morning while performing his duties. We need not seriously consider the liability of the appellant for death benefits if the death resulted from an accident.

Sunday morning the decedent O'Sullivan went upon duty as the night watchman, Cassidy, left. They had a chat and O'Sullivan was then in good condition. About eight-thirty or eight-thirty-five A. M. two employees went to the theatre, rapped at the door and got no answer. Upon looking through the glass they saw O'Sullivan dragging himself along the floor towards the door. He attempted to get up enough to unlock the door, but fell back. They forced the door and picked him up. He said: "I will be all right, just a little upset and nervous; I fell off the stage and had to crawl all the way out here and all upset and nervous." O'Sullivan's face was scratched and one of the employees got some water and washed the blood off of his face. Some blood fell upon his shirt and vest and there was a mark on his face where the skin had been broken and an abrasion — the widow called it a hole in the head — which had been bleeding, and the blood

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had dried. He complained of his arm and thought it was broken, and when they moved it for him it hurt him. He was entirely rational and was anxious that they should not alarm his wife. He was fifty-seven years of age, in good health, with a little hitch or limp in his walk at times, and of good habits. He had not lost a day's work in years.

When the night watchman left the theatre, as O'Sullivan entered it, it was in good condition; the footlights were unbroken and the seats in front of the stage were in their usual condition. The theatre was ready for rehearsal that morning and a metal piece had been placed on some chairs immediately in front of the stage. The stage was about three feet above the orchestra floor, and on the front of the stage was an apron of wood which was freshly shellacked several times a week. There is concrete at the edge of the stage, near the footlights, which is shellacked every day. The floor was slippery. Actors used resin on their shoes to avoid slipping. At the edge of the stage there is a slope of the floor where it goes into the footlights, the drop or depression there being called the pan. O'Sullivan changed his clothes at top room No. 2, and in order to reach this room it was necessary for him to cross the stage. When found he had on the shoes he wore in the theatre; his street shoes were in the top room. It is evident, therefore, he had been across the stage into top room No. 2 and had to pass at least partly across the stage. After O'Sullivan was found it was discovered that several of the footlights were broken near a place where a little ladder came to the stage, and the first two chairs below the stage, at the left side, were broken, tipped back and partly pulled from the concrete floor into which they were screwed, and the metal piece was not as it was left upon the chairs, but was tipped over and leaning against the chairs in the aisle. There is no way in which this disordered condition of the footlights and these chairs and the metal piece could have occurred aside from accounting for it as O'Sullivan stated. The Commission had the right to feel that after changing his shoes in the top room, he came out across the stage to descend the little ladder and slipped upon the slippery floor or in the depression, breaking the lights and the seats and disarranging the metal piece. A man falling from the stage near the

ladder, at a place where the footlights were found broken, would naturally fall at the place where the seats were broken and the metal piece disarranged. Some accident must have happened at that place after the night watchman left. No suggestion is made of any other manner in which the damage could have occurred to the property at that time. We cannot say there is no evidence to justify the award; in fact it seems to rest comfortably upon the evidence. In death cases the same quality of evidence as to the conduct of the deceased is not required as in a case where he is alive and can take the stand. It is assumed that if he could speak he would give a reasonably satisfactory account of himself as to matters which might not otherwise be understood. (*Grafte v. Art Color Printing Co.*, 191 App. Div. 669; *Mullen v. Schenectady R. Co.*, 214 N. Y. 300, 305; *Harrison v. N. Y. C. & H. R. R. R. Co.*, 195 id. 86, 89; *Braun v. Buffalo General Electric Co.*, 200 id. 484, 496 and cases cited.) But here we have his speech, and it is fully confirmed by the condition of the stage, the seats and the metal piece. His normal mental condition when discovered, the story he told and the condition at and near the stage, justified the finding of the Commission that he fell from the stage and received his injuries. The conclusion that the death resulted from the accident fairly rests upon the evidence.

It is said that a hospital record shows that a month before the accident O'Sullivan was treated there for hemiplegia and that probably his injury came from a similar attack. The parties who made the record at the hospital can give no satisfactory account of it, but state that they make it up from information which they acquire in almost any way and from what they are told. The wife, and his co-employees, if believed, make it impossible that O'Sullivan could have been treated at the hospital at the time stated. Whether he was at his work every day was a matter of easy proof; his co-employees and the wife testify to the fact. If this was not true it was easy for the employer to prove the time he had lost. We cannot review the determination of the Commission as to the facts if there are any facts tending to sustain it. The award should be affirmed.

Award unanimously affirmed.

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Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of MEYER LEDERSON, Respondent,
for Compensation under the Workmen's Compensation Law,
v. CASSIDY & DORFMAN, Employer, and ROYAL INDEMNITY
COMPANY, Insurance Carrier, Appellants.

Third Department, March 2, 1921.

**Workmen's Compensation Law — relation of parties — person
injured during test as to knowledge respecting operation of
machine is not an employee.**

An applicant for work, claiming to be a machine operator, who was injured
while adjusting a machine to do work assigned to him by an employer to
test his qualifications, was not an employee at the time of the injury, as
his employment or non-employment depended on the result of the test.

KILEY, J., dissents, with opinion.

APPEAL by the defendants, Cassidy & Dorfman and another,
from a decision and award of the State Industrial Commission,
made on the 25th day of February, 1920, and also from a
decision and award of said Commission made on the 11th day
of June, 1920.

Frank J. O' Neill [*Barnett Cohen* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy
Attorney-General, of counsel], for the respondents.

JOHN M. KELLOGG, P. J.:

This is an appeal from awards of compensation made by the
State Industrial Commission February 25, 1920, and June 11,
1920. The employer needed a man to run one of its machines.
An employee brought with him the claimant, who had a union
card and represented himself to be an operative. The finding
is that the employer informed "the claimant that he would
like to see whether or not the claimant knew how to operate a
machine before he would hire him. The claimant undertook
to prove his qualifications by operating a machine assigned to
him by the said William Dorfman and before actually starting
on any work on the machine, and while preparing the machine
for the purpose of doing certain work assigned to him by

William Dorfman, which was to test his ability, and while engaged in the regular course of his employment in adjusting a strap on the machine, which had become loose, the left hand of the claimant got caught in the said machine, thereby causing him to sustain a strain and possible fracture of the left shoulder, together with lacerations of the body, as a result of which injuries he was disabled from October 14, 1919, to February 25, 1920, on which date he was still disabled."

It seems to me there was clearly no contract of employment. The respondents seek to sustain the award by cases where student brakemen had been put upon a train to learn the business and were injured while learning. But there the students were working with the understanding that they were to have compensation when they learned to do the work. Here the company did not undertake to teach the claimant; he claimed to be an operator and it was understood that before any question of employment, wages or work was discussed, he must demonstrate that he was an operator. The employment or non-employment depended upon the result of the test. It cannot be said that while making the test he was an employee; he was simply trying to prove that he was fit to become an employee. I think the case is fairly within *Brassard v. Delaware & Hudson Co.* (186 App. Div. 647). And see *Varney v. Ditmars* (217 N. Y. 223, 228).

I favor a reversal and a dismissal of the claim on those authorities.

All concur, except KILEY, J., dissenting, with a memorandum.

KILEY, J. (dissenting):

It must be that some evidence in this record was overlooked. The employer's report of injury contains the following: "Did accident happen on the premises? Yes. Away from the plant of employer? No. Full name of injured employee: Max Lederson. * * * Occupation when injured? Operator. Was injured employee doing his regular work? *Just started*. How long was injured person in your employment? *Just started*. Piece or time worker? Week. Working hours per day? Nine." The injured employee in his claim for compensation says he was a time

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worker with wages at fifty dollars per week. In his evidence upon a hearing he explained that nothing was said about wages because he had a union card and the schedule of wages for an operator was fixed by the union and that the employers, one of whom was there when he started to work, knew that he would have to pay and claimant receive the schedule rate. This was not denied. Mr. W. F. Quigley, who represented the appellant carrier upon the hearing, under date of April 7, 1920, wrote the Industrial Commission as follows: "There is no dispute as to the rate of compensation. The question we raise is one of law." A hearing was had on February 25, 1920, and an award was made in favor of the claimant. The appellant carrier asked for a further hearing for the purpose of examining one of the firm as to the contract of hiring, which was granted. That came on June 11, 1920; the member of the firm whose testimony was desired was ill; the attorney for the carrier was permitted to state, for the record, what he would testify to if he was present and sworn as a witness. It was as follows: That claimant was unknown to the employer who met him at the factory, that a conversation ensued, and that the member of the firm said to him, "I would like to see whether or not you know how to operate a machine before I can hire you. Just come into the factory and show me. If you are satisfactory we will then agree upon a price if I decide to take you on." Claimant denied that the employer said anything of the kind to him, saying he knew the union scale and what he would have to pay for his work and what his work was; that he pointed out the machine to him upon which he was to work and which he was to operate; that the foreman brought a bundle of cloth or cut goods to him upon which he was to work; that he proceeded to get his machine ready and was so doing when the accident occurred. If the claimant's story was true, he had started in upon his employment and he would be entitled to compensation; if it was not true, then he would not be entitled to compensation. This presented a question of fact which the Commission was called upon to resolve. Having resolved it in favor of the claimant, can we disturb the finding? (Workmen's Compensation Law, § 20, as amd. by Laws of 1919, chap. 629.) "The decision of the Commission shall be final as to all questions of fact, and, except as pro-

vided in section twenty-three, as to all questions of law." Section 23 (as amd. by Laws of 1917, chap. 705) permits an appeal on questions of law. *Brassard v. Delaware & Hudson Co.* (186 App. Div. 647) presents a different state of facts from that here involved, and is not controlling. I favor affirmance.

Award reversed and claim dismissed.

WILLIAM T. MAXWELL, as Bank Commissioner of the State of Arkansas, Respondent, *v.* JOHN F. THOMPSON and OSCAR F. LANE, as Executors of, and LEE D. VAN WOERT and RUTH THOMPSON VAN WOERT, as Trustees under, the Last Will and Testament, etc., of ALBERT LANE, Deceased, Appellants.

Third Department, January 5, 1921.

Banks and banking — action by Bank Commissioner of foreign State to enforce assessment against stockholder, resident of this State — constitutionality of foreign statute (Act 113 of Acts of General Assembly of 1913, State of Arkansas) increasing liability of stockholder — foreign statute construed — interest on assessment — costs.

In an action by the Bank Commissioner of the State of Arkansas to enforce an assessment against the defendants' testator made under section 36 of act 113 of the Acts of the General Assembly of 1913 of the State of Arkansas, it appeared that the testator, a resident of this State, was one of the original incorporators and stockholders of a bank organized under the Manufacturers and Traders Act of the State of Arkansas which did not contain any provision imposing liability on the testator greater than his investment in the stock of the bank, and that in 1913 the aforesaid act 113 was passed making a stockholder liable to the extent of the amount of his stock in addition to the amount invested in such stock. Said act also provided in effect that any bank which should fail to declare its purpose to continue business thereunder should not be allowed to do business in the State.

Held, that a judgment in favor of the plaintiff should be affirmed;

That the act under which the aforesaid assessment was made, having been declared constitutional by the courts of the State of Arkansas, the courts of this State will not reconsider the subject so as to reach a different conclusion;

That it was not necessary for the bank to give notice to the testator of a meeting called for the purpose of determining whether the bank should

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elect to continue business under the act, for pursuant to the provisions thereof the question was for the board of directors to decide.

Interest was properly chargeable upon the assessment against defendants' testator from the time the assessment was payable.

Since the right to maintain the action is based upon matters foreign to the administration of the estate, costs were properly taxed and allowed.

APPEAL by the defendants, John F. Thompson and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Otsego on the 13th day of September, 1920, upon the decision of the court rendered after a trial before the court at the Otsego Trial Term, a jury having been waived.

Thompson & Van Woert [J. F. Thompson of counsel], for the appellants.

Cooke & Basinger [Harris L. Cooke of counsel], for the respondent.

KILEY, J.:

In 1890 the Bank of Pine Bluff, at Pine Bluff, Jefferson county, Ark., was organized under the Manufacturers and Traders Act of the laws of the State of Arkansas, with a fixed capital of \$100,000, shares \$25 each. (See Ark. Acts of 1868-69, No. 92; Kirby's Digest Ark. Stat. § 837 *et seq.*) Albert Lane, appellants' testator, a resident of Otsego county, N. Y., was one of the original incorporators; his subscription amounted to \$2,000, or eighty shares of the stock at its par value. In 1896 the capital stock of the bank was reduced one-third; he surrendered his certificate and received a new certificate representing stock, at par value of \$1,333.33. Albert Lane died in July, 1908; the appellants represent his estate in the different capacities as indicated in the title of this action. This was a State bank, and at the time of its organization the act under which it was organized did not contain any provision imposing liability on the stockholder greater than his investment in the stock of the bank. In 1913 the General Assembly of the State of Arkansas passed a law entitled: "An Act for the organization and control of Banks, Trust Companies and Savings Banks." (Ark. Acts of 1913, act 113.) The act provides for the appointment of a Bank Commissioner

who shall be charged with the execution of all laws relating to organization, inspection, supervision, control, liquidation and dissolution of banks or trust companies. He has power, under the act, to make rules and regulations for the conduct of the business of said banks and trust companies. Section 10 of said act defines a "bank" as follows: "Whenever in this Act shall be used the word 'bank,' it shall be understood to apply alike to any incorporated bank, trust company, savings bank, copartnership or individuals transacting a banking business." Section 36 of said act provides as follows: "The stockholders of every bank doing business in this State shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock; *provided*, that persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to liability as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living and competent to act and hold the estate in his own name." Let it be observed here that the words "doing business in this State," found in the first and second lines of this section, refer to "bank" and not to the individual "stockholders," immediately preceding the above-quoted words. Section 19 of said act provides: "The affairs and business of any incorporated bank organized under the laws of this State, shall be managed and controlled by a board of directors of not less than three, who shall be selected from the stockholders at such times and in such manner as may be provided by its by-laws." A bank speaks only through its board of directors. Section 4 of said act, speaking of banks theretofore organized, says: "It shall be the duty of each *bank* heretofore organized and doing business in this State, to report within thirty days after this Act goes into effect, to the Bank Department, a full and complete list of its stockholders, or members, as the case may be, showing the residence and the amount of stock or interest owned by each, and all such banks as shall make such report and declare its purpose to continue business under this Act

shall be authorized to do so without the payment of any additional fee, or without the filing of any additional articles of agreement or articles of partnership, providing the legal fees have once been paid for such service. Any bank, trust company or savings bank that shall fail to make report and declare its purpose to continue business, shall not be allowed to do business in this State, and all such as have not paid fees shall pay the same fees as are provided for herein." It will be observed that it is the *bank*, not the *stockholders*, who are called upon to act under this section. Section 61 of said act provides that it shall take effect January 1, 1914. On January 8, 1914, the Bank of Pine Bluff filed a certified list of its stockholders and declared its intention and purpose to continue business under the act in question, viz., act No. 113 of the Acts of the General Assembly of 1913, State of Arkansas. Albert Lane, appellants' testator, and his estate have owned stock in this bank from its incorporation down to the present time. On July 3, 1914, the said bank was insolvent, and its assets and property were taken possession of by the Bank Commissioner of the State of Arkansas. He found the bank hopelessly insolvent, and to such an extent that it was necessary to call upon each of the stockholders for an amount equal to the amount of the capital stock held by each of them; such assessment was made under the provision and authority found in section 36 of said act. The estate of Albert Lane refused to pay the amount called for by the assessment made as aforesaid; suit was brought and resulted in a judgment in favor of the plaintiff as such Commissioner, and from which judgment this appeal was taken. Appellants object to the judgment against them upon the following several grounds, viz.: That said act 113 of the General Assembly of 1913 of the State of Arkansas violates subdivision 1 of section 10 of article 1 of the Constitution of the United States; that it is violative of section 1 of the 14th Amendment of the Constitution of the United States; that it also violates section 17 of article 2, section 18 of article 2, and section 21 of article 2 of the Constitution of the State of Arkansas, and section 6 of article 12 of the Constitution of the State of Arkansas. The case of *Dartmouth College v. Woodward* (4 Wheat. 518) arose in the time of Daniel Webster, in the State of New Hampshire. The

question under consideration there was the power of the Legislature of a State to interfere with or take away any powers the State had vested in a private corporation. Mr. Justice STORY writing in that case said: "If the Legislature mean to claim such an authority [to take away any powers vested by its charter in a private corporation] it must be reserved in the grant." This decision, I think, was in 1819. In *Looker v. Maynard* (179 U. S. 52), speaking of the effect of the decision in 4 Wheaton (*supra*) and of such a provision as suggested by Mr. Justice STORY in his opinion in that case, and citing *Greenwood v. Freight Co.* (105 U. S. 13, 20, 21), it was said: "After that decision, many a State of the Union, in order to secure to its Legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its Constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the Legislature. * * * The effect of such a provision, whether contained in an original act of incorporation, or in a Constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the Legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object to the grant, or any right vested under the grant, and which the Legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." In the Constitution of the State of Arkansas adopted in 1874 is found section 6 of article 12, of which it is urged the plaintiff's claim and subsequent judgment is violative; it reads as follows: "Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revokable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such a manner, however, that no injustice shall be done to the corporators." The cases above cited from the United States courts show that this act is

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authorized and operative, and consequently any act legally done under this provision of the Constitution is authorized. Act 113 of the Acts of 1913 was enacted into law by authority of section 6 of article 12 (*supra*). The constitutionality of said act 113, same as raised here, was before the courts of the State of Arkansas in *Davis v. Moore* and *Graham v. Davis* (argued together and reported in 130 Ark. 128). It was there held this act was not unconstitutional. That statute having been passed upon by the courts of the State of Arkansas, adversely to the appellants' contention, we should respect the decision and should not reconsider the subject so as to reach a different conclusion. (*Jessup v. Carnegie*, 80 N. Y. 441.) In *Knickerbocker Trust Co. v. Iselin* (109 App. Div. 688) it is held, referring to the personal liability of a stockholder residing in this State on stock owned by him in a foreign corporation, that "Such liability is a contractual liability assumed by becoming a stockholder and is enforceable everywhere." The same case holds that the validity and interpretation thereof are determined by the *lex loci*, but the remedy is governed by the *lex fori*. As before observed, the liability sought to be established in this action was created under section 36 of act 113 of the Acts of 1913 of Arkansas. A like liability, in all essentials, is created by the Banking Law of this State and by the National Banking Law. (See Consol. Laws, chap. 2 [Laws of 1914, chap. 369], § 120; U. S. R. S. §§ 5151, 5152; Federal Reserve Act [38 U. S. Stat. at Large, 252], § 2; *Id.* [38 *id.* 273], § 23.) If it were not so, we could not change the scope of the Arkansas statute by a ruling in this State. (*Schwertfeger v. Scandinavian American Line*, 186 App. Div. 89.) To attempt it is unnecessary, as the law, in that regard, applicable to the Arkansas statute and to the New York statute and the Federal statute, is similar in its operation and effect. In the absence of evidence of the statutory enactments affecting the liability of a stockholder in a foreign corporation, the common law of such State is presumed to be the same as in this State. (*Southworth v. Morgan*, 205 N. Y. 293.) The constitutionality of this act, or the several acts of the several jurisdictions, has been established. (*Looker v. Maynard*, 179 U. S. 46.) It is apparent that even the appellants were satisfied that they must

recede from their general stand upon the unconstitutionality of the act, and fall back upon the provision found in the Constitution of the State of Arkansas, section 6 of article 12, wherein it is urged that the exercise of legislative authority, where an existing charter is "altered or repealed," is limited by the words "in such a manner, however, that no injustice shall be done to the corporators." Corporators are always stockholders at some time; but stockholders are not always corporators; in this case, however, the stockholder was a corporator. Appellants urge that the procedure was in contravention of this provision of the Arkansas Constitution, in that they should have been given notice of a special or regular meeting, as stockholders, where the question was to be decided as to whether the Bank of Pine Bluff should elect to continue business under the provisions of act 113 of the Acts of 1913 of Arkansas. The answer is, that section 4 of said act hereinbefore set forth does not provide or require that notice be given to the stockholder; and section 19 of said act provides that the affairs of the bank shall be "managed and controlled by a board of directors." It appears from the record and findings that appellants did not have notice; but the bank, as such, with the exception of a minor detail, as to town residence in this State of Albert Lane's representative, did comply with the statute. This appeared in the list of stockholders filed with the Commissioner of Banks, and notice not being required does not avail the appellants. The principal reason for filing the list of stockholders with the Banking Department was so that any notice required could be sent to such stockholder. In this case it did no damage, because the proper parties, appellants, received notice of the assessment. While it is held that the necessity for the assessment and the amount of such assessment are not open to question in a suit against stockholders therefor (*Bushnell v. Leland*, 164 U. S. 684; *Casey v. Galli*, 94 id. 673; *National Bank v. Case*, 99 id. 628; *Christopher v. Norvell*, 201 id. 216), as hereinbefore observed, the Federal and Arkansas laws in this regard are similar; therefore, these cases state the rule applicable here. Yet notwithstanding these holdings, section 56 of the Arkansas statute (Acts of 1913, act 113) does provide that a review of the action of the Commissioner of

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Banks may be had before the Court of Chancery; the appellants did not seek a remedy there. The Bank of Pine Bluff continued to do business from January 1, 1914, to July 3, 1914, and it will be presumed to have accepted the benefit conferred by that act in its favor, and to have acted under the only authority it was entitled to act under. (*Clement v. United States*, 149 Fed. Rep. 305.) The Arkansas act (Acts of 1913, act 113, § 4) provided that unless the bank brought itself under the provisions thereof, it must cease to do business; it having continued under such action as it did concededly take, the appellants will not now be permitted to deny its existence or legal validity. "To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, shall be as if it were real, and the law properly so regards it." (*Casey v. Galli*, 94 U. S. 673.) This principle was followed in *Davis v. Moore* (130 Ark. 128), which was similar to this case. The same principle was upheld in *Norman v. Federal Mining & Smelting Co.* (180 App. Div. 325). Appellants take the position that they, being non-residents of the State of Arkansas, cannot be held to have had constructive notice, no actual notice having been had. Having reached the conclusion that notice was not required under said act, if I am right, the question is not of importance. Interest was properly charged from the time the assessment was payable. (*Davis v. Moore* and *Graham v. Davis*, 130 Ark. 128, *supra*.) To the same effect is *Mahoney v. Bernhard* (45 App. Div. 499, 502). The right to maintain this action is based upon matters foreign to the administration of the estate, and costs were properly taxed and allowed. (*Dunn v. Arkenburgh*, 48 App. Div. 518; Code Civ. Proc. § 3246, down to the exception, which exception is not the case here.)

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim for Compensation under the Workmen's Compensation Law, on Account of the Death of WILLIAM WATKINSON, v. HOTEL PENNSYLVANIA, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, February 28, 1921.

Workmen's Compensation Law — accidental injury inferred from known facts — body of bellboy found at bottom of elevator shaft — constitutional law — Workmen's Compensation Law, section 15, subdivision 8, and Education Law, article 47, providing for raising and administering of rehabilitation fund are valid.

The decedent, who was a bellboy in a hotel, was missed during his tour of duty and was later found dead at the bottom of an elevator shaft. On all the evidence, *held*, that the decedent's death was caused by an injury which arose out of and in the course of his employment, and that from the known facts it may be inferred that said injury was accidental.

Subdivision 8, section 15, of the Workmen's Compensation Law, providing that in the case of the death of an employee leaving no one entitled to compensation the sum of \$900 shall be paid to the State Treasurer for the establishment of a rehabilitation fund, is valid, and the sum fixed is not so large as to be considered arbitrary and extravagant and an abuse of power.

Article 47 of the Education Law, added by chapter 760 of the Laws of 1920, provides a complete and valid law for raising a rehabilitation fund in this State and administering that fund for the purposes therein declared; section 1210 of said article provides for acceptance and administration of the Federal fund only in accordance with the act of Congress and does not make any existing law of this State or of the United States a part thereof, nor does it enact that any existing law shall be applicable within the prohibition of the State Constitution.

H. T. KELLOGG, J., dissents.

APPEAL by the defendants, Hotel Pennsylvania and another, from an award of the State Industrial Commission, entered in the office of said Commission on the 22d day of July, 1920.

The award was made to the State Treasurer upon the ground that there were no persons surviving entitled to compensation.

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Benjamin C. Loder [*E. C. Sherwood* and *William B. Davis* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel, and *Bernard L. Shientag*, counsel for State Industrial Commission], for the respondents.

VAN KIRK, J.:

The evidence in this case discloses that the deceased Watkinson was employed at the Hotel Pennsylvania, having more than fifty rooms, as a bellboy, working from twelve midnight to seven A. M. This was a hazardous employment under the Workmen's Compensation Law. (See § 2, group 34, as amd. by Laws of 1917, chap. 705.) His duties were to attend guests to rooms and answer calls from rooms. He was engaged in his work on the morning of May 23, 1920. He had answered a call to room 1529, returned his card for this call and taken another card for room 824. Evidently this latter call had not been filled; the hour stamped on this card was twelve-fifty. Early in the morning of May twenty-third search for Watkinson was instituted. Mr. De Mott went to the Pullman restaurant and was there told by the cashier that Watkinson had been there about one-thirty in the morning and purchased two sandwiches. Sometimes late at night bellboys went outside to get food for guests. Passenger elevator shaft No. 8 was usually closed about one or one-thirty in the morning and remained closed till six-thirty or seven A. M., when it was the custom for the elevator men to take the daily papers to the several floors and leave them for the bellboys to distribute to the several rooms. The bellboys usually rode from floor to floor in the elevators and sometimes they used elevators without permission. In the morning, when the search was instituted for Watkinson, it is said the car was at the fourth floor. Below the main floor (at which the car was usually left when the elevator was closed) is a basement, where there is a door into the elevator shaft. About one P. M. of May twenty-third Watkinson's body was found at the bottom of No. 8 shaft, with a mark on his head, showing a blow. The car in shaft 8 had been running since morning. In some

manner, not disclosed by the evidence, he fell down this shaft. He could not have been in the car, but must have gotten into the shaft below the car. There was no way to get into the shaft except through a door leading into it from one of the floors.

We have in the evidence, from established facts and fair inference, the framework of a valid claim under the Workmen's Compensation Law. It appears that Watkinson met his death in the course of his employment; that the injury arose out of his employment; and it is a fair inference, from the known facts, that his was an accidental injury. The award was justified.

The award is \$100 for funeral expenses and to the State Treasurer of the State of New York (1) \$100 pursuant to the provisions of subdivision 7 of section 15 of the Workmen's Compensation Law (added by Laws of 1916, chap. 622, as amd. by Laws of 1917, chap. 705); (2) \$900 pursuant to the provisions of subdivision 8 of section 15 of the Workmen's Compensation Law (as added by Laws of 1920, chap. 760).

No question is raised as to the award for funeral expenses, or the award under subdivision 7 of section 15, which is valid. (*Edsall v. Edsall*, 179 App. Div. 481, 485; *affd.*, 222 N. Y. 651; *Matter of State Industrial Commission v. Newman*, Id. 363; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 235; *New York Central R. R. Co. v. White*, Id. 188.)

The \$900 award under subdivision 8 of section 15 is attacked upon two grounds:

(1) The Rehabilitation Law conflicts with article 3 of the State Constitution (§§ 1, 17) and subdivision 8 of section 15 of the Workmen's Compensation Law falls with it.

(2) Subdivision 8 of section 15 conflicts with article 1, section 6, of the State Constitution and with section 1 of the Fourteenth Amendment of the Federal Constitution.

Considering the second criticism first:

Article 1, section 6, of the State Constitution is the Bill of Rights, and the due process of law clause and the just compensation clause are invoked. Under section 1 of the Fourteenth Amendment of the Federal Constitution the equal protection law clause is invoked. No question is open under the provisions of the State and Federal Consti-

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tutions invoked after the decisions above cited (particularly in *Mountain Timber Co. v. Washington* and *New York Central R. R. Co. v. White*), except whether or not the amount fixed in the statute is unfair or unreasonable. There may be an extravagant and arbitrary amount fixed. Is the amount here fixed such? All reasonable presumptions are in favor of the validity of the act, and the burden of proof and argument is upon those who seek to overthrow it. (*Mountain Timber Co. v. Washington, supra*, 237.) The sum fixed in the statute is not great, is not larger than could readily be awarded, had the deceased left dependents. There is no evidence in this case showing that the sum fixed is so extravagant or arbitrary as to constitute an abuse of power. The court cannot say that \$900 is an unfair or unreasonable sum for the purposes intended.

As to the first criticism:

Subdivision 8 of section 15 reads: "An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the State Board of Vocational Education is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance; but such additional compensation shall not exceed ten dollars a week. The expense shall be paid out of special fund created in the following manner: The insurance carrier shall pay to the State Treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of nine hundred dollars. The State Treasurer shall be the custodian of this special fund and the Industrial Commission shall direct the distribution thereof."

This subdivision was added on May 13, 1920, by chapter 760 of the Laws of 1920. The fund so provided for is payable to an employee who has been injured and totally or partially incapacitated for a remunerative occupation, and who is entitled to compensation under the Workmen's Compensation Law only.

Section 1 of article 3 of the State Constitution is: "The legislative power of this State shall be vested in the Senate and Assembly." And section 17 is: "No act shall be passed which shall provide that any existing law, or any part thereof, shall

be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

Chapter 760 of the Laws of 1920 is entitled: "An act to accept the provisions of any law of the United States making an appropriation to the States for the rehabilitation of physically handicapped persons, to amend the Workmen's Compensation Law, in relation to the maintenance of employees undergoing rehabilitation, and to amend the Education Law, in relation to the rehabilitation of physically handicapped persons, and making an appropriation therefor."

The 1st section enacts subdivision 8 of section 15 of the Workmen's Compensation Law as above quoted. The 2d section amends the Education Law and enacts a new article 47, known as the Rehabilitation Law, being sections 1200 to 1210. It creates an advisory commission for the rehabilitation of physically handicapped persons, as defined therein, it enumerates the powers of the commission in section 1204, fixes duties upon the Industrial Commission and the Department of Health and the Department of Education and authorizes the latter department to receive gifts and donations for the purposes of this article, which may be offered unconditionally. Section 1210 is as follows:

"Acceptance of law of the United States. The State of New York, through its legislative authority:

"1. Accepts the provisions of any law of the United States making appropriation to be apportioned among the States for vocational rehabilitation of disabled persons;

"2. Empowers and directs the Board of Regents of the University, hereby designated the New York State Board for Vocational Education, to co-operate with such agency as the Federal government shall designate to carry out the purposes of such law;

"3. Appoints the State Treasurer as custodian of all money given to the State by the United States under the authority of such law, and such money shall be paid out in the manner provided by such act for the purposes therein specified;

"4. Authorizes the Board of Regents of the University as the State Board for Vocational Education and the Industrial Commission to formulate a plan of co-operation in accordance

with this act, which shall be effective when approved by the Governor of the State."

The attack upon this law is formulated in this manner: The whole chapter (the Rehabilitation Law) is built around section 1210. This is void because based on the acceptance of the Federal statute and the whole act falls with section 1210.

This position is untenable. In the sections of the chapter prior to section 1210, funds in this State are provided. The uses to which these funds are put are defined and a commission is appointed for administering these funds in compliance with the instructions in the statute. Here is a complete act entirely separable from section 1210, maintainable and operative without it, and I can conceive no reason why the Legislature would not have wished the statute to be enforced with section 1210 rejected. (*People ex rel. Alpha P. C. Co. v. Knapp*, 230 N. Y. 48, 59.) Under these sections the award as made in this action may be lawfully used.

We turn then to section 1210. Legislation was pending in Congress, which subsequently and on June 2, 1920, was duly enacted, whereby the Federal government made provision for vocational rehabilitation of persons disabled in industry or in any legitimate occupation and their return to civil employment, and appropriated funds to be apportioned among the States to that end. (See 41 U. S. Stat. at Large, 735, chap. 219.) By section 1210 of our Education Law the law for the use and distribution of those funds only is accepted. It does not accept the Federal law for distributing any of the State funds, and it delegates to the board it names administrative powers only. It is not a surrender of the legislative power of this State to any outside legislative body. The act is no more than an acceptance of the fund and then providing a board or body which may receive the Federal fund and co-operate with the Federal authorities, so that this Federal fund may be available to the State of New York and its citizens to be used, as it must be, in the manner required by the government which supplied the funds. The Rehabilitation Law is the legislative act of the Senate and Assembly of the State of New York, and it does not make any existing law of this State (or of the United States) a part thereof, nor does it enact that any existing law shall be applicable within the prohibition of article 3 of

our State Constitution. The purpose of section 17 of article 3 of our Constitution is stated in *People ex rel. Commissioners v. Banks* (67 N. Y. 568, 575): "The evil in view in adopting this provision of the Constitution was the incorporating into acts of the Legislature by reference to other statutes, of clauses and provisions of which the Legislature might be ignorant, and which, affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law, which would not receive the sanction of the Legislature if fully understood." In *Choate v. City of Buffalo* (39 App. Div. 379), chapter 466 of the Laws of 1892 was considered, which provided that land taken by the city of Buffalo for public parks, "shall be under the control and management of the said park commissioners, and shall be maintained and improved, the same as the existing system of parks and approaches in said city, as provided in and by title eleven of chapter one hundred and five of the laws of eighteen hundred and ninety-one, and the other provisions of said chapter applicable thereto." And further provided: "The same powers of control, maintenance, construction and jurisdiction, which are conferred by title eleven of chapter one hundred and five of the laws of eighteen hundred and ninety-one, upon the city of Buffalo * * *, over public parks, approaches, streets, roads and avenues in said title mentioned, shall extend and apply to all parks and approaches authorized by this act." The court held that these provisions were not in conflict with section 17 of article 3 of the Constitution of this State. In *People v. Davis* (78 App. Div. 570) the court held that a statute declaring the Sanitary Code to be binding and in force in the city of New York does not violate this section of the Constitution; and, on page 576, said: "The Sanitary Code, when declared to be binding and in force, was not an existing law of the State within the meaning of that section of the Constitution, and it was not by any act of the Legislature declared applicable to, or made or deemed a part of, such act."

The Federal government has distributed funds to the States before (Land Grant Act of 1862, 12 U. S. Stat. at Large, 503, chap. 130), and our Legislature has provided for their use by Cornell University. (Laws of 1863, chap. 20;

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Laws of 1865, chap. 585; Laws of 1880, chap. 317; Laws of 1891, chap. 56; Education Law, §§ 1030-1039, as amd.)*

We conclude that chapter 760 of the Laws of 1920, without section 1210 of the Education Law, provides a complete and valid law for raising a rehabilitation fund in this State and administering that fund for the purposes therein declared; that section 1210 provides for acceptance and administration of the Federal fund only, in accordance with the act of Congress; and that such provision does not offend against our Constitution, and is valid.

The award should be affirmed.

All concur, except H. T. KELLOGG, J., dissenting.

Award affirmed.

In the Matter of the Intermediate Judicial Settlement of the Accounts of SAMUEL G. H. TURNER and CONRAD S. SHEIVE, as Executors, etc., of WILLIAM E. SHEIVE, Deceased. SARAH C. SHEIVE, Appellant; SAMUEL G. H. TURNER and Others, Respondents.

Third Department, February 28, 1921.

Executors and administrators — claims against estate — claim by widow for money loaned to husband — evidence not justifying allowance.

The proof by a widow of an alleged claim against her husband's estate for money loaned to him was insufficient to establish the claim, and the action of the surrogate in refusing the allowance thereof was proper.

APPEAL by Sarah C. Sheive from that part of a decree of the Surrogate's Court of the county of Chemung, entered in the office of said surrogate on the 21st day of June, 1920, disallowing the claim of the appellant.

Stanchfield, Lovell, Falck & Sayles [Pierre W. Evans of counsel], for the appellant.

Lewis Henry, for the executors, respondents.

* See, also, State Finance Law, § 93, as re num. from § 97 by Laws of 1911, chap. 634.—[REp.]

David N. Heller, special guardian for the respondent Helen Frances Sheive.

VAN KIRK, J.:

The widow of the deceased, Sarah C. Sheive, presented a claim against her husband's estate for \$4,900, which she claims she loaned to him between March, 1913, and January, 1917, \$500 or \$600 being loaned on each occasion. From the disallowance of this claim the appeal is taken. The only witness for claimant is her sister, who testifies that each loan was made in her presence, no others being present than the deceased and the claimant. The witness lived in Philadelphia. Five of the loans were said to have been made in Philadelphia, the others in Elmira, the home of the deceased. No note or memorandum in writing is claimed to have been given for any loan, but it does appear that for another \$500 loan the deceased gave a note, which was paid when the claimant presented it after his death. The sister testifies that, on the first occasion, the loan was of a wedding present. Of the other moneys loaned it is claimed that the sister first loaned to the claimant and she in turn loaned it to the deceased. She says that the moneys which were loaned in Elmira she had brought with her in cash from Philadelphia. She had four bank accounts in Philadelphia, yet neither bank account showed a withdrawal of any one of the amounts she testifies she furnished to her sister. The safety deposit box of deceased contained, at the time of his death, in bills, \$2,645. He was not accustomed to borrowing money at his bank. The deceased died possessing an estate of some \$200,000. In his will he gave to his wife \$25,000, and she received \$18,000 in addition by an agreement with other legatees. The will makes no mention of any indebtedness to his wife.

The appellant urges that the surrogate decided the case under a misapprehension of the law. His decision shows that he gave careful consideration to the testimony and found that the evidence in support of the claim was insufficient. He cites an authority (*Butcher v. Geissenhainer*, 125 App. Div. 272), which had been somewhat modified or explained by the decision of the Court of Appeals in *McKeon v. Van Slyck* (223 N. Y. 392) and other recent cases. But he has evidently decided the case on account of insufficiency of

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the claimant's proof. The surrogate was the trier of the facts, and it was entirely proper that he should have in mind those rules of caution which are referred to in *McKeon v. Van Slyck*.

We find no error in the decision of the surrogate, that his decision was well justified by the evidence, and the order denying the claim should be affirmed, with costs.

Decree unanimously affirmed, with costs.

DAVID C. TAYLOR, Respondent, v. IRINE K. EMBURY, Appellant.

Third Department, February 28, 1921.

Tenants in common — replevin — right of tenant working farm on shares to maintain replevin against landowner for his share of hay.

A tenant and a landowner become tenants in common of hay which the tenant cuts under an agreement that he is to have a share thereof, and the tenant, after demand and refusal, is entitled to maintain an action in replevin to recover his share of the hay. ✓

APPEAL by the defendant, Irine K. Embury, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Madison on the 2d day of August, 1920, upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

David A. Embury, for the appellant.

John A. Johnson, for the respondent.

VAN KIRK, J.:

The action is in replevin to recover a quantity of hay. In July, 1919, the parties made a contract by which plaintiff agreed to cut the hay on defendant's farm on shares, plaintiff to have two-fifths of the alfalfa and one-half of the timothy, but plaintiff was not to be required to cut fields not cut the previous year. Plaintiff performed on his part. He asked the defendant for a division and delivery to him of his share, to which she replied: "'No,' I wasn't to have any part of that hay."

It appears from the discussion between the court and counsel and from the charge of the court that the amount of the hay cut and the taking of two loads thereof by the plaintiff were not disputed; and that the jury should render a written verdict, deciding what was the contract; whether it was substantially performed by plaintiff, and in which party was the title to the hay. The jury rendered the following written verdict: "Verdict for the plaintiff awarding to the said party the title and right to possession of 16 tons of alfalfa, of the value of \$280, and 10 tons of mixed hay of the value of \$120. Total value of hay awarded to said party, \$400. Deduct $1\frac{1}{2}$ tons delivered at \$12 per ton, or \$18, from \$400, making the value of the hay, \$382."

The evidence was sufficient to show demand by plaintiff and refusal by defendant. (*Burns v. Winchell*, 44 Hun, 261.) Plaintiff and defendant were tenants in common in the hay harvested. (*Harris v. Frink*, 49 N. Y. 24; *Stall v. Wilbur*, 77 id. 158; *Thomas v. Williams*, 32 Hun, 260.)

The general rule is that a tenant in common in personal property may not maintain an action in conversion or replevin against his cotenant; but this rule does not prevail when the property is in its nature separable in respect to quantity and quality by weight or measure. In respect to such property a cotenant may demand his share; and, if refused, he may maintain an action against his cotenant. (*Stall v. Wilbur*, *supra*; *Gates v. Bowers*, 169 N. Y. 14.) The usual action under such circumstances is in conversion (cases above cited); but, if conversion will lie, there is no controlling reason why replevin will not lie; why one may not recover his property rather than its value. He may want his hay to feed, not to sell. This hay can be readily and fairly divided by weight and measure, so that the plaintiff may justly determine that which is his own; and although no direct authority in this State is cited, holding that, under such circumstances, a replevin action may be maintained, we can conceive of no reason why a man should not be permitted to recover that which is his own, rather than its value. In 34 Cyc. (p. 1355) it is said: "The proceeding in replevin being partly *in rem*, is therefore distinguishable from trespass and trover, in which action damages only are sought to be recovered. However,

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in all cases where trespass or trover can be maintained for the unlawful conversion of goods, replevin will also lie. In the choice of remedies, as between replevin and trover, or trespass, the preference is with the former, in that it restores the property itself." Again (on p. 1359) is this: "Generally, where property cannot be identified or separated, so as to be seized in kind, replevin will not lie. However, according to the trend of modern decisions, where goods are mixed, and are of the same nature and value, although not capable of an actual separation by identifying each particle, yet, if a division can be made of equal value, as in the case of oats, corn, or wheat, then each party may claim his aliquot part, and enforce his right in an action in replevin." (*Rust Land & Lumber Co. v. Isom*, 91 Am. St. Rep. 68.)

The defendant is not prejudiced or injured because this action is in replevin rather than conversion. In fact, by consent of counsel, this hay had been sold and the money retained in place of the hay; and, as the case was submitted to the jury, upon the suggestion of the court and the approval of the attorneys, the verdict was for the value of the hay rather than for the hay itself.

The judgment should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE A. STAFFORD, Relator, v. EUGENE M. TRAVIS, as Comptroller of the State of New York, Respondent.

Third Department, February 28, 1921.

Taxation — income tax — non-resident carrying on business in New York — tax on income derived from export trade not tax on exports in violation of Federal Constitution — retroactive statute — effect of striking out provision from statute which made it unconstitutional — retroactive tax statute not invalid.

The relator, a resident of the State of Connecticut, maintained an office in New York city where he transacted all of his business of buying and selling goods for foreign trade on orders received from his representatives in foreign countries, but none of the goods were purchased in New York

nor stored there except to await cargo space, and were not handled otherwise by the relator, and, though billed to him, were marked for foreign shipment. Another class of relator's business was the filling of orders received by commission merchants in New York city from foreign trade, and in this class of business the relator delivered the goods, with the necessary papers, to the commission merchants, and received pay for the goods from them.

Held, that the relator was engaged in carrying on business within the State of New York within the meaning of section 351 of the Tax Law, as added by Laws of 1919, chapter 627.

The tax imposed on the relator's income from filling foreign orders for goods is not a tax on exports within the meaning of article 1, section 10, of the Federal Constitution.

Section 362 of the Tax Law, as added by Laws of 1919, chapter 627, having been held unconstitutional by the United States Supreme Court for the reason that it did not grant the same exemptions to non-residents as it did to residents, the subsequent act of the Legislature in granting equal exemptions to all taxpayers remedied the defect and left the act valid, and it was not necessary for the Legislature in 1920 to reimpose the tax for 1919.

However, if the present assessment is imposed under the 1920 re-enactment, it is nevertheless valid, since a tax law is not made invalid by the fact that it is retroactive in operation.

CERTIORARI issued out of the Supreme Court and attested on the 9th day of November, 1920, directed to Eugene M. Travis, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular the proceedings had in adjusting an account for income taxes for the year 1919 against the relator under article 16 of the Tax Law of the State of New York, added by chapter 627 of the Laws of 1919, as amended, and under section 374 of said Tax Law.

Louis H. Porter, for the relator.

Charles D. Newton, Attorney-General [*James S. Y. Ivins* of counsel], for the respondent.

VAN KIRK, J.:

The taxpayer, George A. Stafford, is a citizen of Connecticut, living in Stamford in that State, where he votes. He has no home, permanent or temporary, in the State of New York. He is a cotton goods merchant; his office and place of business is in the city of New York. He has no business office in Connecticut. Traveling salesmen, living in Constantinople,

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Buenos Ayres and many other foreign cities, take orders for goods, which orders are sent him by letter or cable to his New York office. He buys the goods in other States than New York and buys none in New York State. These goods are billed to him, marked, however, for foreign shipment. On receiving notice from the manufacturer that the goods are ready for shipment, he immediately engages cargo space; and, when the goods are delivered to him in New York, generally he immediately transfers those goods to the ship in which cargo space has been engaged. If cargo space has not been engaged, the goods are held sometimes a week or ten days for a ship, during which period the goods are stored in New York. Mr. Stafford, however, owns no storehouse in New York but hires a storehouse, or space in a storehouse, as occasion requires. The goods purchased by him are sometimes purchased to fill the order; at other times he purchases from a mill a large quantity of a kind of cotton goods and the orders he receives from abroad are filled from this general purchase. About one-half of his income is derived from this class of business.

There is another class of business. These foreign agents sometimes take orders, which they deliver to commission merchants in New York, other than Stafford. These orders, having been transferred to him by a commission merchant, he fills as in the former class of business. When the goods are delivered to him in New York, he in turn delivers them, with the accompanying papers, to the commission merchant, receives his pay for the goods and has nothing further to do with the transaction. Of this class of business Mr. Stafford sometimes has direct reports from his salesmen, sometimes not.

The business belongs to Mr. Stafford personally, but he is doing business under the name of "G. A. Stafford & Company." In the foreign cities Mr. Stafford says: "In some instances" the business is not "conducted in the name of G. A. Stafford & Company. * * * I think probably our name is on the door in most of them." But these foreign offices and agents do not sell exclusively for Mr. Stafford, some of the orders, as above stated, being sent to commission merchants. Sometimes the rent of foreign offices is paid directly by Mr. Stafford and sometimes it is a part of the compensation of the salesmen,

From the first class of business, which Mr. Stafford denominates as direct export business, the net income calculated for 1919 was \$91,990.91; from the second class, \$112,255.35; and the total tax on both items, \$5,442.03.

The taxpayer contends first that the business is not carried on within the State of New York, so as to subject the income derived therefrom to taxation by the State of New York; and urges that the first class of business is entirely an export business. The tax is imposed upon the income of a non-resident "from all property owned and from every business, trade, profession or occupation carried on in this State." (Tax Law, § 351, as added by Laws of 1919, chap. 627.) The taxpayer has no other place of business. He personally takes no part in any transaction, except in New York. The orders for goods to be shipped come to him at his New York office and are accepted there. All of the orders which he sends for goods are sent from his New York office. The goods are paid for in or from New York and he is paid for goods sold in New York. He is not a commission merchant, who earns his income by a charge for business transacted for others, but he purchases goods outright and they become his in New York and he sells them outright from New York. The goods are not goods passing through the State as a part of a movement in interstate or foreign commerce. His income is made by the difference between the price paid for the goods and the price at which they are sold. He employs no capital abroad and has no investments abroad. The business is solely his. All of his activities, his banking and capital are in New York. If he earns his income, he earns it in New York and nowhere else. He has the protection of the laws and police power in New York in his person, his property and his business; and he derives benefit therefrom; else, why does he conduct his business in New York? If he is not doing his business in New York, where is he doing it? Certainly not where he purchases his goods, for those who sell to him are protected by the laws of the State in which they live, and it is their protection, not his. His income is no part of the profits of manufacture. He has nothing to do with manufacturing the goods. He pays the full price for the goods after manufacture. The income from manufacturing is taxable (but not against

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him) in the State where the mill is, as in the Oklahoma oil business, discussed in *Shaffer v. Carter* (252 U. S. 55). He certainly would not claim that his business was in a foreign country, and he was under the protection of a foreign, sovereign State. He would not be subject to an income tax in a foreign country, in which his traveling men work. For the value of their work in foreign countries he pays, and his net income is calculated after those payments are deducted. The supposed case of an attorney, who goes to Kentucky and earns a fee, is not parallel. It would be a nearer parallel if the New York attorney, under a retainer, had done all of the legal work in New York and then sent his clerk, or another attorney, whom he pays for the service, to Kentucky to act for him in completing the particular business. The attorney's income from this would be earned in New York, less the fees and expenses of his employee. In the conclusion reached here there is nothing in conflict with holdings in *People ex rel. Alpha P. C. Co. v. Knapp* (230 N. Y. 48).

We conclude then that the taxpayer's business was carried on within the State of New York.

It was held in *Travis v. Yale & Towne Mfg. Co.* (252 U. S. 60) that the tax does not violate the due process of law provision of section 1 of the Fourteenth Amendment to the Federal Constitution.

With reference to the direct export business, so called, the taxpayer contends that it is a tax upon exports, and, therefore, in violation of the Federal Constitution, article 1, section 10, subdivision 2. It is hardly conceivable in what respect this tax could be called a tax upon exports. The tax is upon the net income and profits of the taxpayer's business and not upon the business itself, and certainly not upon the goods. If the taxpayer were a real estate dealer, the tax upon his income would not be a tax upon real estate. The source of his income is not the goods that he buys and sells, but the skill and ability that he exercises in conducting his business, in buying at a given price and selling the same goods at a higher price. (*Peck & Co. v. Lowe*, 247 U. S. 165; *United States Glue Co. v. Oak Creek*, Id. 321; *Shaffer v. Carter*, *supra*, 57.)

The State has jurisdiction over the source of this taxpayer's income. (*Shaffer v. Carter*, *supra*, 57.)

I can see no substantial difference between taxing the income of a man, who does all of his business in New York and resides outside, and of another man, who does all of his business in New York and happens to have a home in New York. While in New York the non-resident is subject to the jurisdiction of the State and its courts, wherever his residence may be; and jurisdiction can be acquired of his person at any time when he is within the limits of the State. The fact that his home is in Connecticut, and that, when in Connecticut, personal jurisdiction of him cannot be acquired, bears upon the means of enforcing the tax, rather than the right of assessing it. The State may have authority to levy a tax, though it does not have power to collect it by action for recovery of a personal judgment. (*City of New York v. McLean*, 170 N. Y. 374, 379.) In *Shaffer v. Carter* (*supra*) the court said: "In our system of government the States have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses." It seems to me of little avail to debate whether or not the income then is a personal tax or an excise tax. Whether one or the other is a question of definition. "The decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed." (*Shaffer v. Carter*, *supra*, 55.)

The next criticism is that, in this particular case, the tax is retroactive. The statute imposing the tax first was section 351 of the Tax Law (as added by Laws of 1919, chap. 627). In the act (§ 362, as added by Laws of 1919, chap. 627) exemptions were given to resident taxpayers which were not given to non-resident taxpayers. In 1920 (Laws of 1920, chap. 191) the Legislature struck out the word "resident" from the provision as to exemptions so that the same exemptions were allowed to non-residents as to residents. (See, also, Laws of 1920, chap. 58, repealing § 362, subd. 3.) This

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answered every criticism that the United States Supreme Court had passed upon the act, and the enactment in the Laws of 1919 stood as valid. In *Yale & Towne Mfg. Co. v. Travis* (262 Fed. Rep. 576) it was held that, so far as chapter 627 of the Laws of 1919 attempts to assess non-residents and collect a tax, without according to them the privileges and immunities afforded by the act to citizens of New York, it is unconstitutional and void under article 4, section 2, of the Federal Constitution. The action was in equity to restrain the Comptroller from the threatened enforcement of penalties against the complainant, unless it complies with the terms of the Income Tax Law; and the relief asked for was granted. In the same case on appeal (*Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60) the court held that the act, in granting exemptions to residents and not to non-residents, discriminates against non-residents and the tax is not enforceable as it offends against said provision of the Federal Constitution. The exemptions referred to were \$1,000 to single persons, \$2,000 to married persons and heads of families, and \$200 to each dependent. (Tax Law, § 362, as added by Laws of 1919, chap. 627.) In all respects other than this inequality the act is held valid. There is no difficulty in separating the good from the bad. "The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether." (*People ex rel. Alpha P. C. Co. v. Knapp*, 230 N. Y. 60.) The Legislature has answered this question by striking out of section 362 the word "resident" and thus giving the exemption to all taxpayers. This entirely remedied the defect and left the act valid. "Unless the conclusion be unavoidable, 'a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.'" (*People ex rel. Alpha P. C. Co. v. Knapp*, *supra*, 62.) This word "resident," which

rendered the act unconstitutional, being excised, the statute in its valid form is preserved and operative. (Id. 64.) Were this an assessment under the act before amendment, the court would modify it by giving the relator the benefit of these exemptions in calculating the tax. (Id. 65.) The relator has had the benefit of these exemptions in making this assessment. The reimposition of the tax for the year 1919, in section 351-a of the Tax Law (as added by Laws of 1920, chap. 191), was unnecessary. Upon the amendment being made to section 362, the act as passed in 1919 became fully operative and the tax was lawfully assessed under that act.

In *Stockdale v. Insurance Companies* (20 Wall. 323) the court was considering an income tax under the act of July 14, 1870. Section 17 of that act (16 U. S. Stat. at Large, 261) provided that certain sections of the Internal Revenue Act of 1864 (13 id. 283, § 120 *et seq.*), relating to taxes upon dividends of banks, insurance companies, etc., as amended by subsequent statutes, "shall be construed to impose the taxes therein mentioned to the first day of August, eighteen hundred and seventy, but after that date no further taxes shall be levied or assessed under said sections; and all acts and parts of acts relating to the taxes herein repealed, and * * * all the provisions of said acts, shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed or accruing under the provisions of former acts," etc. The court said (on p. 331): "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864,* imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it."

In *Brushaber v. Union Pacific R. R.* (240 U. S. 1) the nature and quality of income taxes were fully discussed, and the case of *Pollock v. Farmers' Loan & Trust Co.* (157 U. S.

* See 13 U. S. Stat. at Large, 417, Res. No. 77.— [REP.]

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429) analyzed and explained. In the former case the statute imposing income taxes in 1913 was under discussion. (See 38 U. S. Stat. at Large, 166, chap. 16, § 2.) The statute was enacted October 3, 1913, but fixed the first tax period beginning March 1, 1913, months before the act was passed, and ending December 31, 1913; and the court says that the validity of the tax, having this retroactive element, is not open to discussion since *Stockdale v. Insurance Companies* (*supra*). The State of New York has as broad powers for assessing income taxes within its own limits as has the Federal government. If then the assessment is made under the re-enactment of the statute in 1920, we are of the opinion that the assessment is valid.

The determination of the Comptroller should be affirmed.

Determination unanimously confirmed, with fifty dollars costs and disbursements.

JAMES McPHILLIPS, Respondent, v. NEW YORK TELEPHONE COMPANY, Appellant.

Third Department, February 28, 1921.

Real property — action to recover real property and remove telephone poles — title derived from State — effect of failure of State to give patent — effect of Federal control of defendant's property on right to maintain action — criticism of trial justice by attorney on appeal disapproved.

In an action to recover real property and to remove telephone poles and wires constructed thereon it appeared that the plaintiff's predecessor in title purchased the land in question from the State, paying a part of the purchase price and giving a bond for the remainder; that the balance due was not paid and the State exposed the land for sale but withdrew it and took a deed; and that later the State commenced an action to recover possession, which resulted in a judgment in favor of the defendants therein on the payment to the State of the amount still remaining due, but a patent was not issued as required by section 35 of the Public Lands Law.

Held, that at the time of the commencement of this action the plaintiff had a good title to the land in question.

The defendant does not claim title to the land and it cannot raise the question that the plaintiff has not received a patent therefor.

The fact that the Federal government was in control of the defendant's property temporarily at the time of the commencement of this action under a joint resolution of Congress and a proclamation of the President, is not a good defense.

The act of the attorney for the defendant in criticizing the trial justice in his argument on appeal is disapproved.

APPEAL by the defendant, New York Telephone Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Warren on the 12th day of January, 1920, upon the decision of the court rendered after a trial at the Warren Trial Term, certain questions of fact having been submitted to a jury, and also from an order entered in said clerk's office on or about the same day, denying defendant's motion for a new trial made upon the minutes.

John A. Delehanty, for the appellant.

C. E. Fitzgerald [*John H. Barker* of counsel], for the respondent.

VAN KIRK, J.:

The action is to recover real property and to remove defendant's line of telephone poles and wires constructed and existing across lot 139 of the Luzerne Tract in Warren county. The jury and the court have found, on evidence sufficient to sustain the findings, that twelve of defendant's poles are upon plaintiff's land, without consent or acquired right; that trees and brush were cut when the line was constructed, and that damages in the amount found were suffered. The judgment conforms to the findings and directs the removal of the poles, wires and attachments.

The appellant strongly urges that the plaintiff has not proved his title. Under the provisions of the statutes which subsequently became a part of the Public Lands Law (See Laws of 1836, chap. 457; Gen. Laws, chap. 11 [Laws of 1894, chap. 317], § 30 *et seq.*) in January, 1863, this lot 139 was sold by the State to Benjamin Latham who paid twenty-five per cent of the purchase price and executed and delivered his bond to the People of the State of New York for the balance thereof, in form as required by the statute. By mesne conveyances all of his rights in this lot have gone to the plaintiff. Benjamin Latham

died in 1873, never having complied with the conditions of his bond. Thereafter, in 1899, the State exposed this lot for public sale, but withdrew it. This rendered the sale void. (*People v. Inman*, 197 N. Y. 200, 205.) But the State took a deed. An action was then brought by the State against Simon Lavine, Joseph Lavine, Lena Lavine, the Hudson Valley Railroad Company, a corporation, and James McPhillips, this plaintiff (then successors of Benjamin Latham in his right and title). The court found: "That the plaintiff is entitled to a judgment for the immediate possession of said lot, unless, on or before the 1st March, 1918, the defendants pay to the Attorney-General, for the People, the full amount due on said bond [the Latham bond] with interest, taxes and costs of advertising; and I hereby direct judgment accordingly." An interlocutory judgment accordingly was entered. On February 8, 1918, this plaintiff paid to the State the full amount due as so found, and thereupon final judgment was entered that the defendants are, according to their respective rights, the owners in fee and entitled to retain the possession of said lot 139, Luzerne Tract, free and discharged of, and from all claims of the State thereon by reason of said bond of said Benjamin Latham. In the meantime the defendants Lavine had conveyed all their interests to this plaintiff. The plaintiff then, at the time this action was begun, had a good and sufficient title. In the Public Lands Law it was provided that, upon payment of the bond, a patent should be issued by the State to the purchaser. (Consol. Laws, chap. 46 [Laws of 1909, chap. 50], § 35.) Though the State has not patented the lands to this plaintiff, after payment of the bond, the court has decided that, as against the State, the plaintiff is the owner. Neither the State nor any one representing it raises the question. This defendant claims no title and cannot be heard to question the title which the court has held good. No one but the State can take advantage of an omission on the part of the patentee or the State to comply with a condition of the sale or grant. (*Deering v. Reilly*, 167 N. Y. 184, 194; *Williams v. Sheldon*, 10 Wend. 654, 658.)

The appellant further urges that the action cannot be maintained because the Federal government was in possession when the action was commenced. Under a joint resolution of

Congress and a proclamation of the President of the United States (40 U. S. Stat. at Large, 904, chap. 154; *Id.* 1807), the Federal government, as a war measure, took possession of this telephone line and was operating it at the time the action was begun. This plaintiff cannot maintain an action against the Federal government, and it was not made a party defendant. The action, however, is brought to recover real property as against an adverse claimant. The Federal government was not and could not be bound by the judgment; but it claimed no title to or interest in the property; its possession was but temporary; and its use of the line did not deprive the plaintiff of his right to prosecute the action against the defendant, although the judgment could not be executed while the Federal government was still exercising the control of operation of the line. The Federal government made no objection that it was not a party, and, since the judgment was entered, it has relinquished its use of the line and restored it to this defendant. To whomsoever the line belonged, the government, in its sovereign power in war emergency, would have taken the use of the line during the emergency. By such taking the defendant was not prejudiced in its defense, and the plaintiff should not be prejudiced in asserting and having determined his property rights, subject to the use of the government. We do not consider the extraordinary, temporary, use by the government a sufficient reason why the plaintiff should be deprived of his adjudicated rights and required to relitigate them against the same defendant.

On the argument the attorney for the appellant severely criticised the trial justice, and we must express our disapproval. The comments of the attorney were entirely uncalled for and unjustified by the record. At the end of the evidence the court stated, after some discussion with counsel: "I think I will take the verdict of the jury and let them determine how many poles, if any, were upon the lands of the plaintiff, or the lands which the plaintiff now claims. I will pass on the other questions which have come up, because those relate to the injunction or the requirement that you move the poles. Of course, that is not a question for a jury." Later he stated that he would also submit to the jury the question of damages. No objection was taken to this proposed procedure

by the court. It was, therefore, plainly understood by the attorney that, as to all questions other than those which were to be submitted to the jury, the court would decide; and, when the court gave the attorneys opportunity to present requests to find, it was entirely in harmony with the understanding of the attorneys, and, since there was the question of the removal of the poles, an entirely proper practice, without the consent of the attorneys.

The judgment should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

BRESLIA CONSTRUCTION COMPANY, Appellant, v. STONE MASONS CONTRACTORS' ASSOCIATION, by THOMAS KENNEDY, as President, and Others, Respondents.

First Department, March 4, 1921.

Monopolies and combinations — agreement between contractors' association and unions against public policy and tending to create monopoly and to throttle competition — right of contractor expelled from association to injunctive relief and damages — conspiracy against contractor in violation of Penal Law, section 580.

An agreement between an association of stone mason contractors and stone masons' unions, under which the unions agreed to work exclusively for members of the association, and to help enforce the latter's decrees against expelled members, and against any persons or firms engaged in the mason trade who were not members of the association, and under which the association agreed to employ only men who were members of the stone masons' unions, is illegal and against public policy and tends to create a monopoly and to throttle competition.

Hence, a corporation engaged in masonry construction which, although willing to employ union labor, has been compelled by the aforesaid association, unions and individuals connected with them, to abandon the performance of its contracts because its president had been expelled from the association for non-payment of dues, is entitled to an injunction and also damages.

The unions in acting as the tools or instrumentalities of the contractors' association for meeting out punishment to the corporation, although having no grievance of their own against it, thus also became wrongdoers.

The acts of the association and unions were malicious, wanton interferences with the rights of the corporation, which contravened the provisions of section 580 of the Penal Law, which declares that "If two or more persons conspire: * * * 5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, * * * Each of them is guilty of a misdemeanor."

APPEAL by the plaintiff, Brescia Construction Company, from a judgment of the Supreme Court dismissing the complaint on the merits, entered in the office of the clerk of the county of Bronx on the 17th day of April, 1920, upon the decision of the court rendered after a trial at the Bronx Special Term, and also, as stated in the notice of appeal, from the decision herein entered in the said clerk's office on the 31st day of March, 1920.

Charles R. Bradbury, for the appellant.

Mortimer M. Menken of counsel [*Menken Brothers*, attorneys], for the respondents.

GREENBAUM, J.:

The plaintiff is a corporation engaged in the business of masonry construction in the borough of The Bronx. The defendants may be described generally as follows: The Stone Masons Contractors' Association is an incorporated association composed of firms and individuals engaged as contractors in stone and mason work; the defendants Stone Masons' Union, Local No. 74, and Stone Masons' Union, Local No. 47, are unincorporated associations composed of workers in stone and brick masonry, and the other defendants are individuals who are connected with one or the other of the foregoing associations.

The gravamen of the complaint is that the Contractors' Association, in conjunction with the defendant labor unions and the individual defendants, confederated and conspired to prevent plaintiff from obtaining laborers and workmen in connection with the mason and stone work contracts upon which plaintiff was engaged, in pursuance of a plan agreed upon between them whereby they virtually secured a monopoly of the stone and brick masonry work in the borough of The Bronx.

The president of the plaintiff corporation is one Antonio

Brescia who, prior to September, 1919, had himself been a member of the defendant Stone Masons Contractors' Association. Differences arose between him and that association as to the amount of dues owing by him to the association, as a result of which he was expelled from its membership. The plaintiff corporation, which was practically owned by Brescia, was not a member of the Contractors' Association.

It is not disputed that on or about September 19, 1919, William L. Phelan, Inc., was engaged in the construction of buildings and contemplated the erection of a large number of houses in The Bronx, and that it contracted with plaintiff for the stone and mason foundation work in connection with the construction of a number of these buildings, for which plans had been filed. Brescia testified that about two weeks after he had put his men on this job the defendant Louis Mazzola, who is the president and business agent of the defendant Stone Masons' Union, Local No. 74, ordered the men who were employed by the plaintiff to quit work, which they did; that he thereafter made numerous efforts in The Bronx and in Brooklyn to secure other workmen and that on every occasion, after he had succeeded in getting some of them, they were again called off the plaintiff's job with the result that it was unable to proceed with the work of construction under its contracts with the Phelan Company and was compelled eventually to abandon them. The defendants did not deny that they were responsible for calling off the workmen on plaintiff's jobs. Mazzola frankly states in his testimony that his action was taken in pursuance of the instructions of the Contractors' Association. On his direct examination he testified as follows: "I said, 'Mr. Brescia, we were notified by the Stone Masons Contractors' Association that you are not in good standing. Will you kindly settle up your trouble before we take any action?' He says, 'All right. I will straighten out, Mr. Mazzola.' " He further testified that he subsequently met Brescia at Pythias Hall, which is located on One Hundred and Forty-ninth street near Walton avenue, the headquarters of the association, but that the matter was not straightened out; that he went to Brescia's job and told the men who were working there, "Boys, there is a violation of the agreement on that job. Now it is up to you." The

witness admitted that there was a shortage of stone masons in The Bronx and that about 300 members of his organization went to Brooklyn because the wages there were higher.

Mr. Phelan, the president of William L. Phelan, Inc., corroborated Brescia. He testified that he heard Mazzola tell Brescia on one of the jobs that "he could not work on the job, that he would not give him any men; he said that he was in bad," and thereafter the men left the job. He also testified that a number of the individual defendants, who were members of the Contractors' Association, endeavored to have him give them the contracts for doing the mason work in his building which had been awarded to plaintiff and that he refused.

The sole question here is whether the concerted acts of the Contractors' Association and the labor unions in depriving plaintiff of the workmen engaged by him in his masonry and stone setting work had legal sanction. Defendants' justification for their action in ordering off the men who were employed by the plaintiff seems to be that Brescia was no longer a member of the Contractors' Association. In support of this plea they rely upon a written agreement between the defendant association and Union No. 74, which will be presently considered. There is no claim that Brescia refused to employ union men. On the contrary, he testified that he was in favor of employing union men and that he was only too ready to use them.

The evidence of defendants was that the Contractors' Association and Labor Union No. 74 had co-operated under an agreement for many years. A copy of the latest of these agreements was introduced in evidence by the defendants. In view of the defense, a study of this agreement becomes necessary. It contains the following provisions: "*First.* Members of the Stone Mason Contractors' Association agree to employ none but members in good standing of Union No. 74 or members of any other subordinate union of the Bricklayers, Masons and Plasterers International Union of America and *vice versa*, members of Stone Masons' Union No. 74 agree to work for only members of the Stone Mason Contractors' Association and members of the Mason Builders' Association, it being expressly agreed, however, between all the parties to this agreement, that this exception permitting the members

of Union No. 74 to work for members of the Mason Builders' Association shall apply only when such member of the Mason Builders' Association is engaged as general contractor; but should members of the Mason Builders' Association engage themselves to do stone foundation work, or undertake mason work on a building as distinguished from general contracting, then in such event no stone mason from Union No. 74 shall work for such member of the Mason Builders' Association."

The "thirteenth" paragraph of the agreement reads as follows: "Members of the Stone Mason Union No. 74 or the members of any other subordinate union of the Bricklayers, Masons & Plasterers International Union, etc., if included herein or whom this agreement may effect (sic) agree not to, directly or indirectly, work for or under any contractor, builder, corporation or persons owing money to any member of the Stone Mason Contractors' Association, for work performed or materials furnished."

The other clauses pertinent to such an agreement refer to such matters as hours of labor, wages and arbitration.

The essential facts here appearing differ radically from those cases which have frequently arisen which involved the right of members of labor unions to refuse to work for those who do not employ union labor, or to pursue lawful means for inducing those who do not engage labor union men to do so; or to pursue lawful methods for securing betterment of conditions under which to work, including such matters as hours of work and wages. In the instant case we find that the defendant labor unions, in effect, entered into an alliance with the Contractors' Association under which the members of the union agreed to work exclusively for members of the Contractors' Association and to help it to enforce its decrees against expelled members or, for that matter, perhaps against any persons or firms engaged in the mason trade who were not members of the Contractors' Association. The defendant unions had no grievance against the plaintiff. The grievance was that of the Contractors' Association, which utilized the labor unions to enforce its mandates against other contractors who were not affiliated with it. It seems to us that the acts complained of by the plaintiff and established upon the trial peculiarly offend the principles of law expressed in the opinion

of the Court of Appeals in the case of *Curran v. Galen* (152 N. Y. 33). In that case the plaintiff was an engineer by trade, who complained that two of the individual defendants threatened him that unless he would join the Brewery Workingmen's Local Assembly, 1796, Knights of Labor organization, and pay the initiation fee and subject himself to its rules and regulations, they and that association would obtain plaintiff's discharge from the employment in which he then was and would make it impossible for him to obtain any employment in the city of Rochester or elsewhere. In its opinion the court, after stating that an "organization, or the co-operation, of workingmen is not against any public policy" and that it has the "sanction of law when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate (Penal Code, sec. 170),"* proceeds as follows:

"But the social principle which justifies such organizations is departed from, when they are so extended in their operation as either to intend, or to accomplish, injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict that freedom, and through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice BARRETT in *People ex rel. Gill v. Smith* (5 N. Y. Cr. Rep. at p. 513), 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages, or the maintenance of the rate.' Every citizen is deeply interested in the strict mainte-

* Now Penal Law, § 582.—[REP.]

nance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness, which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies, or the fellow-feeling which, as a social principle, underlies the association of workmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed towards the repression of individual freedom, upon what principle shall it be justified?"

The correctness of the law as stated in the opinion just quoted has not been gainsaid in any subsequent case. It is the law of this State.

What was said in the *Curran Case* (*supra*) about the rights of workmen applies in principle with equal force to the rights of those engaged in business who employ workmen. A person thus engaged has the same constitutional right as the defendants to pursue his lawful business without the willful molestation and the malicious interference of another.

Assuming that Brescia was justly expelled by the Contractors' Association from its membership, its jurisdiction over him ceased with his expulsion. The difference between him and that association did not justify the means it adopted in depriving the plaintiff of its workmen and driving it out of business. It resorted to unlawful methods in punishing the plaintiff because its president may have offended the officers of the association or refused to comply with its mandates. The defendant Contractors' Association being without lawful warrant to destroy plaintiff's business, it follows that those who actually aided and abetted it in effectuating these illegal acts are equally culpable with it.

The defendant unions, in acting as the tools or instrumentalities of the Contractors' Association for meting out punishment to the plaintiff corporation, thus also became wrongdoers. As has been observed, the labor unions had no grievance of their own against the plaintiff and yet they carried out the behests of the Contractors' Association to ruin the lawful occupation of the plaintiff. The acts of the combined associations were malicious, wanton interferences with the rights of the plaintiff, which contravened the provisions of section 580 of the Penal Law, which declares that "If two or more persons conspire: * * * 5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, * * * Each of them is guilty of a misdemeanor."

It seems to us clear that the provisions of the agreement between the defendants which obligated the members of the union to work exclusively for members of the Stone Masons Contractors' Association, with the unimportant exception therein mentioned, as well as that provision of the agreement which requires the members of the defendant unions not to do any work "for or under any contractor, builder, corporation or persons owing money to any member of the Stone Mason Contractors' Association, for work performed or materials furnished," are illegal and against public policy. The effect of such a contract is to force by intimidation, threats and coercive measures one who is unwilling to become a member of the Contractors' Association to join it or, upon his failing so to do, to deprive him of the labor which he may require and to interfere with his pursuit of his lawful vocation. And in case any debt is claimed to be due to any member of the Contractors' Association, the agreement contemplates that the labor unions will assist in collecting by arbitrary and oppressive measures claims thus asserted. In other words, instead of according alleged debtors the right to have their disputes determined by the legal tribunals established for that purpose, the defendant associations have constituted themselves the judges of the facts and the law and the agencies for enforcing their unauthorized decrees.

Another grave objection to the agreement is that it tends and is calculated to create a virtual monopoly of the stone

and mason foundation work in the borough of The Bronx. Under the agreement the Stone Masons Contractors' Association has it within its power to throttle competition; to fix prices at excessive rates against the welfare and interest of the community; to dictate terms and assume practical control of all the foundation masonry work in its district.

Defendants cite in support of their defense such cases as *National Protective Assn. v. Cumming* (170 N. Y. 315); *Jacobs v. Cohen* (183 id. 207); *Grassi Contracting Co. v. Bennett* (174 App. Div. 244) and cases which hold that an association of individuals may decide that its members are not to work for specified employers of labor. *State v. Van Pelt* (136 N. C. 633, 663) is a case which is typical of the class of cases in which members of labor unions have been upheld in putting on an "unfair" list those who were opposed to labor unions. There is no such issue here.

In the *National Protective Assn. Case* (*supra*) the court held, as the head note fairly summarizes it, that "a labor union may refuse to permit its members to work with fellow-servants who are members of a rival organization, may notify the employer to that effect and that a strike will be ordered unless such servants are discharged, where its action is based upon a proper motive, such as a purpose to secure only the employment of efficient and approved workmen, or to secure an exclusive preference of employment to its members on their own terms and conditions, provided that no force is employed and no unlawful act is committed."

In effect the court's opinion was that the giving of the reasons which animate the employee in refusing to work "does not affect his right to stop work nor does it give a cause of action to the workman to whom he objects because the employer sees fit to discharge the man objected to rather than lose the services of the objector."

It may be observed that the *National Protective Assn. Case* (*supra*) was decided by a vote of four to three, and that in the opinion of Judge GRAY, concurring with the majority, the rules as stated in *Curran v. Galen* (*supra*) were recognized to be sound, as indeed they were in the dissenting opinion.

Jacobs v. Cohen (*supra*) arose out of a contract between a firm of clothing manufacturers and a union called the Pro-

tective Coat Tailors' Union, in which it was provided that the firm shall not employ any help other than those belonging to or who are members of that union. The question certified to the Court of Appeals was: "Is a contract made by an employer of labor, by which he binds himself to employ and to retain in his employ only members in good standing of a single labor union, consonant with public policy, and enforceable in the courts of justice in this State?" This question was answered in the affirmative by a divided court, Judge VANN writing a vigorous dissent. Slight reflection should convince one that that case differs widely in its facts from the instant case. Besides, in that case the parties operated under an agreement voluntarily entered into. Here the plaintiff was not a party to any agreement with any of the defendants. It may also be noted that the court in its opinion expressly recognized the salutary principles declared in *Curran v. Galen* (*supra*) and differentiated (pp. 211, 212) the facts in the *Curran* case from those of the *Jacobs* case.

In the *Grassi Case* (*supra*) a strike was threatened by a labor union in alleged violation of its contract. The facts were that the plaintiff was a domestic corporation engaged in the construction of buildings for others, and at the time mentioned in the complaint it had a contract for plastering and cement work on a fourteen-story apartment house. It was obligated by its contract to employ only union labor recognized by the building trades. The controversy arose as to the alleged violation on the part of the plaintiff of one of the provisions of the contract which forbade any work being done "between the hours of 7 and 8 A. M., 12 M. and 1 P. M., and 12 M. and 6 P. M. on Saturdays." It was claimed by the union that, in violation of the agreement, two members of the union worked on a Saturday at one-ten P. M. The plaintiff was summoned to appear before a meeting of the executive board of the union to answer charges for violating the contract. An explanation was made by the treasurer of the plaintiff that the violation occurred without the knowledge or consent of the plaintiff. The defendant union, however, decided against the plaintiff and held that it was conducting its operations in an unfair manner, and as punishment it recommended to the union "that a foreman be placed on each and every

job which Grassi Contracting Co. does for one year and that the whole shop be cleaned out of the men who worked for them previous to this trouble."

That case dealt with a contract between two parties, and not with a group of employers who wholly control the trade in a given locality or at least to a considerable extent, and the court nevertheless enjoined the defendant from carrying into effect its unwarranted mandate. In the course of its opinion the court said: "An employer may lawfully discharge or refuse to employ one because he is or is not a member of a labor union, and may lawfully contract with his employees to employ only union labor and to discharge others, or *vice versa*; but it has been held that employers may not combine and agree to employ either only union or non-union labor when such employers control the trade in any community or control it to such an extent that it would be practically impossible for those thus discriminated against to obtain employment, for in such case the agreement would be oppressive and contrary to public policy. [Italics ours.] (*McCord v. Thompson-Starrett Co.*, 129 App. Div. 130; *affd.*, 198 N. Y. 587; *Farrelly v. Schaettler*, 143 App. Div. 273; *affd.*, 207 N. Y. 644.)"

The italicised portion of the opinion from which we have just quoted applies directly to that part of the agreement between the defendant associations under which it was agreed that the contractors would employ only union men, and with equal force to that portion thereof which obligates the union men to work exclusively for the contractors.

The vice of the agreement lies in this, that it is calculated not only to be oppressive to non-union workmen, but also to contractors and builders who are not members of the Contractors' Association. The disagreement between the plaintiff's president and the Contractors' Association furnished no legal justification for its acts of oppression. The illegality of such an agreement is pointed out in *McCord v. Thompson-Starrett Co.* (129 App. Div. 130) and in *Beattie v. Callanan* (82 id. 7).

In the *McCord Case* (*supra*) Mr. Justice SCOTT, writing for the court, said: "I do not understand that there is any serious difference of opinion between us as to the illegality of the

directions to employ only members of one particular union. This seems to be established by the opinion of the Court of Appeals in *Curran v. Galen* (*supra*), reaffirmed and explained in *Jacobs v. Cohen* (*supra*). In the latter case Judge GRAY, writing for the court, makes it quite clear that while an individual employer may lawfully agree with a labor union to employ only its members, because such an agreement is not of an oppressive nature operating generally throughout the community to prevent craftsmen in the trade from obtaining employment and earning their livelihood, yet that such an agreement when participated in by all or by a large proportion of employers in any community becomes oppressive and contrary to public policy because it operates generally upon the craftsmen in the trade and imposes upon them as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."

In *Beattie v. Callanan* (*supra*) Mr. Justice McLAUGHLIN (now judge of the Court of Appeals), writing for a unanimous court, held that the fact that a master painter refused formally to recognize a walking delegate of a union, conferred no right upon the union maliciously to cause parties who had entered into contracts with the master painter to break their contracts, under threats of causing a strike of all the workmen employed by these parties.

The judgment should, therefore, be reversed, with costs, and judgment rendered in favor of the plaintiff for the injunctive relief demanded in the complaint, and if a judgment for damages as prayed for be desired, a reference will be ordered to compute the same, with costs. Settle order on notice, reversing findings inconsistent with this decision and containing new findings.

CLARKE, P. J., LAUGHLIN, DOWLING and MERRELL, JJ., concur.

Judgment reversed, with costs, and judgment directed in favor of plaintiff for the injunctive relief demanded in the complaint, and if a judgment for damages as prayed for be desired, a reference will be ordered, with costs. Settle order on notice.

Before STATE INDUSTRIAL COMMISSION, Respondent.
In the Matter of the Claim of J. W. BIXBY, Respondent, for
Compensation under the Workmen's Compensation Law, v.
COTSWOLD COMFORTABLE COMPANY, Employer, and MARY-
LAND CASUALTY AND GUARANTY COMPANY, Insurance Carrier,
Appellants.

Third Department, March 2, 1921.

Workmen's Compensation Law — accidental injury — exposure — diphtheria as cause of disability — notice of injury is not mere matter of form and reasonable excuse for failure to give must be shown — duty of State Industrial Commission to follow decision of Court of Appeals in applying section 18, relating to notice of accident — requirements of said section condition precedent to award.

Where a carpenter and millwright, who had been exposed to dampness and rendered wet in the course of his employment by the nature of his work, became temporarily disabled by diphtheria, and it appeared that he had been doing like work for two or three months and there was no evidence of an accident or that the exposure was the proximate cause of the diphtheria, the claimant's own physician even declining to testify that there was any relation between diphtheria and the work, the evidence is insufficient to show that the diphtheria in any sense resulted from claimant's exposure. It is the duty of the State Industrial Commission to follow the rules laid down by the Court of Appeals, and not to treat the provisions of section 18, relative to notice, as a mere matter of form. It should not excuse the failure properly to give notice of injury unless evidence is furnished by the claimant that the failure of notice did not prejudice the employer and insurance carrier.

Notice, however formal, that an employee is suffering from a germ disease, is not notice of an accidental injury arising out of and in the course of the employment.

The requirements of section 18 of the Workmen's Compensation Law, relating to notice, are a condition precedent to the right to an award.

COCHRANE, J., dissents.

APPEAL by the defendants, Cotswold Comfortable Company and another, from a decision and award of the State Industrial Commission, made on the 19th day of March, 1920, and filed in the Syracuse office of said Commission.

Bond, Schoeneck & King [Clarence R. King of counsel], for the appellants.

Charles D. Newton, Attorney-General [E. C. Aiken, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

The claimant's disability concededly resulted from diphtheria, a germ disease. The testimony of the attending physician is positive upon these propositions, and there is no dispute. The claimant testified in effect that he was employed as a carpenter and millwright; that on the 12th day of May, 1919, he was obliged in the course of his employment to enter a pit below the floor level; that this pit was about twenty inches deep; that he was obliged to lie down to perform the work; that the pit was damp; that he was also obliged to go out into the rain to get materials and his clothes were rendered wet; that he went home that night not feeling well; that he awoke in the morning with a cold, and the evidence shows that he developed diphtheria. It is not claimed that anything in the nature of an accident occurred in the pit; that there was anything different from the experiences of the two months prior, during which time he had been doing like work off and on, and the claimant's own physician declines to testify that there was any necessary relation between the diphtheria and the work which the claimant was doing. It seems clear that there is the same defect of proof in this case that was pointed out by the court in *Matter of Eldridge v. Endicott, Johnson & Co.* (228 N. Y. 21). There is nothing to show that diphtheria is the natural and unavoidable result of anything which occurred on the 12th day of May, 1919; no accident was established; no evidence was offered to show that the germ disease of diphtheria "naturally and unavoidably" resulted from an accidental injury. (Workmen's Compensation Law, § 3, subd. 7, as amd. by Laws of 1917, chap. 705.) "An accidental event takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause, and therefore not expected." (*Matter of Woodruff v. Howes Construction Co.*, 228 N. Y. 276, 278.) The claimant knew that the pit was damp; knew that he would get wet if he went out in the rain; no unusual effect of the known cause is suggested. There was, therefore, nothing in the nature of an accident, and there is no evidence of probative force that the diphtheria was in any sense a necessary result from the exposure to which the claimant deliberately subjected himself.

Notwithstanding the deliberate decision of the Court of Appeals in *Matter of Bloomfield v. November* (223 N. Y. 265) the State Industrial Commission goes on making a purely formal conclusion of fact that "neither the employer nor the insurance carrier was prejudiced by the lack of such notice [required by section 18], if any, because the employer had knowledge of the injury and the resultant diphtheria immediately thereafter." The statute (Workmen's Compensation Law, § 18, as amd. by Laws of 1918, chap. 634) provides for a written notice which shall "contain the name and address of the employee, and state in ordinary language the time, place, nature and cause of the injury," and the only grounds on which the Commission may excuse the giving of this notice is either that "notice for some sufficient reason could not have been given, or on the ground that the employer, or his or its agents in charge of the business in the place where the accident occurred or having immediate supervision of the employee to whom the accident happened, had knowledge of the accident, or on the ground that the employer has not been prejudiced thereby." Here the evidence is conclusive that no notice whatever was given of any alleged injury. The claimant's wife telephoned to the employer's office that the claimant was ill; it may be that there was information reaching the employer that the claimant had developed diphtheria, but there is not a particle of evidence that any one representing the employer or the insurance carrier had any notice of an alleged personal injury "arising out of and in the course of his employment" (§§ 10, 3, subd. 7, as amd. *supra*), or anything intended to put them on inquiry. There was nothing which was in any sense an equivalent of the notice required to be in writing; no notice of the "time, place, nature and cause" of the alleged injury or of any "such disease or infection as may naturally and unavoidably result therefrom." (§ 3, subd. 7, as amd. *supra*.) Claimant's own physician testified, and was not disputed, that diphtheria is not one of the diseases which ordinarily or naturally comes from injury, and that it was a germ disease. Obviously a notice, however formal, that the claimant had a case of diphtheria would not be notice of an accidental injury arising out of and in the course of employ-

ment, and if it was intended to hold the employer responsible for a disease alleged to have resulted from such an injury it was the duty of the claimant to give the notice required by the statute; to state the "time, place, nature and cause of the injury."

It is perhaps not necessary to determine this question, in view of the previous point decided, but we conceive it to be the duty of the State Industrial Commission to follow the rules laid down by the Court of Appeals, and not to treat the provisions of section 18 as a mere matter of form. The requirements of the statute are a condition precedent to the right to an award, and where the Commission acts to relieve the claimant it should be only upon evidence furnished by the claimant that the failure of notice did not operate to prejudice the employer and the insurance carrier; the facts on which the conclusion rests, not the mere conclusion, should be given in the record.

The award appealed from should be reversed.

All concur, JOHN M. KELLOGG, P. J., on the ground of failure to give notice, except COCHRANE, J., dissenting.

Award reversed and claim dismissed.

CARVEL COURT REALTY COMPANY, INC., Respondent, v.
SIGMUND JONAS, Appellant.

Third Department, March 2, 1921.

Trial — motion to change venue in action brought by corporation in county to which it has removed its office in accordance with Stock Corporation Law, section 13, denied — where stock corporation deemed to have residence — affidavits on alleged convenience of witnesses on motion to change venue insufficient — trial preferred in rural counties rather than in New York city.

A motion for a change of venue will not be granted in an action by a domestic corporation, where the action is brought in the county to which it has removed its principal place of business under section 13 of the Stock Corporation Law.

A domestic corporation is deemed to have its residence in the county in which it has its principal office.

App. Div.]

Third Department, March, 1921.

Affidavits in support of alleged convenience of witnesses on a motion for a change of venue not showing that the many alleged witnesses know anything about the matter in suit, or that they are material witnesses in reference to any fact in issue in the particular case, are insufficient to warrant the granting of the motion.

It is the general practice not to order the trial of causes in New York city where they may be properly tried in rural counties; at any rate the discretion of the court in such cases should not be interfered with in the absence of controlling reasons.

APPEAL by the defendant, Sigmund Jonas, from an order of the Supreme Court, made at the Greene Special Term and entered in the office of the clerk of the county of Greene on the 20th day of November, 1920, denying defendant's motion to change the place of trial from Greene county to the county of New York.

Julius H. Rosansky [*Abraham J. Halprin* of counsel], for the appellant.

Edward W. Lackey [*Joseph M. Fowler* of counsel], for the respondent.

WOODWARD, J.:

The plaintiff brings this action to recover rent for the month of October, 1920, upon premises located in the city of New York. The corporation has changed its principal place of business under the provisions of the Stock Corporation Law (§ 13, as amd. by Laws of 1915, chap. 117) and brings this action in Greene county. The defendant moves for a change of venue upon the ground that the action should have been brought in the county of New York, and upon the further ground of the convenience of witnesses. On a motion of this character a domestic corporation is deemed to have its residence in the county in which it has its principal office (*Finch School v. Finch*, 144 App. Div. 687; *Rubel v. Central Railroad Co. of N. J.*, 171 id. 456), and the plaintiff having acted under the statute, it must be deemed to be lawfully a resident of Greene county and entitled to bring the action there.

The affidavits in support of the alleged convenience of witnesses are lacking in essential elements. It does not appear that the many alleged witnesses know anything about the

particular contract; they are defendants in similar actions, but there is nothing to show that they are material witnesses in reference to any fact in issue in this particular case.

While the rule is not absolute, it is the general practice to decline to order the trial of causes in the city of New York where they may be properly tried in rural counties, and the discretion of the court in this regard ought not to be interfered with in the absence of controlling reasons.

The order appealed from should be affirmed, with costs.

Order unanimously affirmed, with ten dollars costs and disbursements.

GEORGE C. METZGER and WHITEMORE DODD, Copartners
Doing Business under the Firm Name and Style of METZGER-
DODD COMPANY, Respondents, v. THE COE-STAPLEY MANU-
FACTURING CORPORATION, Appellant.

First Department, March 4, 1921.

Principal and agent — action to recover commissions for procuring government contract subject to cancellation in whole or in part by government — admissibility of parol evidence — requested instruction improperly refused — parol evidence to establish elements of contract admissible where letter only supplementary to oral contract.

Where in an action to recover commissions under an oral agreement to procure government contracts which the government reserved the right to cancel in whole or in part, it appears that the agreement between the plaintiffs and the defendant was confirmed by a letter from the defendant but that there was no statement therein as to whether the commissions were to be based on the contract price or on the money received from goods actually delivered to the government, which was the principal issue litigated, it was error for the court to refuse defendant's offer to prove by parol evidence that the commissions were to be paid on the goods actually delivered.

It was also error to refuse defendant's request to instruct the jury that the oral testimony offered might be considered in connection with the letter.

Where a letter actually on its face purports to be a written agreement, but in fact is only supplementary to an oral contract, parol evidence is admissible to determine what the contract was, since it is not offered to vary a written agreement.

APPEAL by the defendant, The Coe-Stapley Manufacturing Corporation, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 8th day of April, 1920, upon the verdict of a jury for \$9,570.28, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

Thomas H. Wight, for the appellant.

George B. Hayes, for the respondents.

GREENBAUM, J.:

In view of the conclusion which we have reached it will be unnecessary to summarize the voluminous testimony adduced upon the trial and discussed in the briefs of counsel. The amended complaint in effect alleges that on or about the 25th day of May, 1918, plaintiffs, as copartners, entered into an agreement with the defendant corporation under which the plaintiffs were employed to render services to the defendant as its agents in negotiating with the United States government for the purchase from the defendant of certain articles known as thong cases. A thong is an accessory used in cleaning rifles; a thong case is a brass tube which holds the thong and also a rifle oiler. Thong tips and thong bodies are separate parts of the thong. The complaint alleges that under the agreement plaintiffs were to receive two and one-half per cent of the contract price of all of the goods which the United States government would agree to purchase from the defendant. It is further alleged that through efforts of the plaintiffs contracts were secured from the United States government in behalf of the defendant at the aggregate price of \$345,700 and that by reason thereof plaintiffs became entitled to the sum of \$8,642.50. Defendant denies the allegations of the complaint as to the terms of the agreement but does not deny the making of a

contract with the United States government. There are also defenses setting up the illegality of the plaintiffs' agreement. One of the important issues litigated between the parties was whether the two and one-half per cent commission was to be based upon the full contract price of the goods as ordered by the government, regardless of cancellations, or upon the actual amount of the goods which were delivered to and accepted by the government. The contract gives the government the right to cancel any portion of the order, and the defendant asserts that as matter of fact but a small portion of the original order was filled due to the government's exercise of its right of cancellation.

Plaintiffs in their bill of particulars dated July 23, 1919, alleged that the agreement set forth in the "fourth" paragraph of the complaint was an oral one under which the defendant agreed to pay to the plaintiffs a sum equal to "2½% of the contract price of said articles as specified in any contract entered into between the defendant and the said Government and procured by defendant through the services of the plaintiffs. * * * After said oral agreement had been entered into and after plaintiffs had entered upon the performance of said agreement the defendant confirmed said agreement by a letter in writing dated May 25, 1918, which letter reads as follows:

" 'WASHINGTON, D. C.

" 'May 25, 1918.

" 'METZGER-DODD Co.,

" '101 Park Ave., New York:

" 'GENTLEMEN.— In the matter of Government contracts covering thong cases and thongs and screw hooks and thumb nuts on which we are bidding and which were brought to us by you, it is understood and agreed that if successful in securing Government contracts on either of these articles we agree to pay you a commission of 2½%.

" 'COE-STAPLEY MFG. CORP.

" '(Signed) E. B. SHOEMAKER,

" 'Vice-Pres.' "

It is also alleged in the bill of particulars that said agreement "between plaintiffs and defendant was made at the City of New York, * * * and was made between on or

about May 13th, 1918, and on or about May 17th, 1918, both dates inclusive, plaintiffs having negotiated and having held a number of conferences with the defendant in connection with said agreement between such dates and same having been consummated and adopted between such dates."

It will thus be seen that plaintiffs expressly admit that the agreement between the parties was made prior to May 25, 1918, and that the letter of that date was merely written as a confirmation of the general understanding of the parties as to the compensation at the rate of two and one-half per cent. In other words, the agreement was really oral or, at most, partly oral and partly written.

During the trial Mr. Dodd, one of the plaintiffs, was asked upon cross-examination whether Mr. Shoemaker, the vice-president of the defendant, had not said to him that the defendant "would not stand for any commission except on the basis of the money that they received; that they would pay you two and a half per cent only on the goods that were shipped and paid for by the Government? Mr. Hayes: Objected to. The agreement speaks for itself. The Court: Was that preceding the signing of this paper? [Referring to the May 25th letter, Exhibit 2.] Mr. Hayes: Yes, I say that is all merged in the agreement. The Court: Objection sustained. Mr. Wing: We ask leave, if your Honor please, to show all of the conversation which occurred. The Court: Put your question and then I will rule. Mr. Wing: Your Honor will grant me an exception to your ruling on the question."

Defendant's counsel then asked the following question: "Well, is it not a fact, Mr. Dodd, that on the occasion when this Exhibit 2 was written, that both before and after the contract, Mr. E. B. Shoemaker said to you that these commissions which you were to receive in connection with the contract were to be paid only when the defendant received its money from the government? Mr. Hayes: Objected to on the same ground. The Court: The same ruling. Mr. Wing: Exception."

Other questions of like import but varied in form were asked, all of which were objected to by counsel for the plaintiff. The objections were sustained, and defendant excepted. It is to be noted in this connection that although the trial

court excluded the proffered testimony to which reference had just been made there was nevertheless considerable evidence on the part of the defendant which had been admitted to the effect that the commissions were to be limited to the moneys received from the government on its contract with defendant.

On the defendant's case a witness named Merwin was called. After having testified that he was treasurer of the defendant company and acquainted with the contracts in suit he stated that about one-quarter of the government's contract was completed. He was asked: "Have you any figures with you from which you can state the exact dates of the delivery of the merchandise under that contract and the dates of payment?" A. Yes, sir. Mr. Hayes: Objected to as immaterial. The Court: Why not dispose of that question now and save time as to that defense? Mr. Hayes: I am quite willing, if your Honor please, to dispose of it now. The Court: As I understand it, the point is simply this: You claim that under this contract you are entitled to $2\frac{1}{2}\%$ on every contract that was awarded by the Government to the defendant, immaterial as to whether any part of it had been carried out by the defendant. Mr. Hayes: Exactly, sir. The Court: Upon that, Mr. Wing, I will hear you."

Colloquy then ensued between the court and defendant's counsel, Mr. Wing, who stated that he desired to show by the witness that the agreement made was that two and one-half per cent was only to be paid upon the amounts received from the government by defendant under the contract. Attention was also called to the cancellation clause of the government's contract. The court finally ended the discussion by the following statement: "Then your party should have inserted that in the contract. The probabilities are that if they had retained counsel to draw this contract instead of drawing it themselves that would have been inserted. In reference to the case of *Mullen v. Washburn* [224 N. Y. 413, 421], cited by counsel for the defendant, the court simply held that which is elementary, that parol evidence may be offered where there is doubt as to the meaning of a contract, and for that purpose only. The stenographer will read the question. (Question read.) The Court: The objection is sustained on the ground that it is

immaterial, irrelevant and is not a part of the issues in this case. Mr. Wing: Exception."

After the learned trial justice had completed his charge to the jury, the defendant's counsel requested the court to charge as follows: "May I ask you to charge the jury that they may take into account the oral testimony given here, coupled with this letter of May 25th, and may determine from all of the circumstances what the contract was, whether it applied to the full face of the contract or whether it was to be a commission of $2\frac{1}{2}\%$ only on the money paid by the Government to the defendant, when and as they were paid." The court refused to charge as requested and defendant's counsel duly excepted.

This request was evidently made despite the exclusion of certain testimony tendered in behalf of the defendant tending to substantiate its claim that commissions were to be limited upon the sums paid by the government under its contract, since there was, as previously stated, testimony admitted in the case to that effect. The request was consistent with defendant's position throughout the trial and the defendant very properly sought to have the record show the theory upon which the court submitted the case to the jury.

The position of the learned trial justice undoubtedly was that the letter of May twenty-fifth in itself embodied the complete agreement between the parties. In thus holding, the learned justice erred. The letter does not state upon what the two and one-half per cent commission was to be computed, whether upon the gross amount of the contract price, or upon the goods actually accepted by the government and paid for. Such an omission in the letter is peculiarly significant in view of the fact that the contract provided that it may be canceled by the government at any time. The letter of May twenty-fifth is also silent as to when the commission was to be paid, whether on the signing of the contract or at any other time. Besides, the plaintiffs admitted in their bill of particulars as well as in their testimony that the agreement was an oral one. The evidence which the defendant desired to offer did not tend to vary the terms of a written agreement. The letter, Exhibit 2, was supplementary to the oral contract. It is unnecessary to cite many authorities upon the proposition that upon the facts appearing in the record before us the learned court erred

in excluding the testimony referred to and in refusing to charge as requested. The law applicable to this case is discussed in *Di Menna v. Cooper & Evans Co.* (220 N. Y. 391, 397).

The judgment and order must be reversed and a new trial ordered, with costs to appellant to abide event.

CLARKE, P. J., DOWLING, SMITH and PAGE, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of J. SCHEMERHORN, Respondent, for Compensation under the Workmen's Compensation Law, v. GENERAL ELECTRIC COMPANY, Employer and Self-Insurer, Appellant.

Third Department, March 2, 1921.

Workmen's Compensation Law — specific schedule — State Industrial Commission has no power to make award for injury in excess of proportionate loss fixed by medical testimony solely upon deputy's examination — loss of use of member is question for those having expert knowledge — section 15 construed.

In proceedings for compensation for a specific injury the State Industrial Commission may not disregard the medical testimony in the case as to the proportionate loss sustained and make an award for an amount in excess of such proportionate loss so found merely on the personal examination and statements made by the deputy commissioner.

The Workmen's Compensation Law, section 15, relating to compensation for specific injuries, nowhere delegates to the Commission the power arbitrarily to determine the proportionate loss of the use of a member, and such power cannot be presumed to have been granted, for the constitutional requirement of due process of law contemplates the protection of life, liberty and property of the citizen against the acts of mere arbitrary power in any department of the government.

It seems, that proceedings for compensation for the proportionate loss of the use of a member present a question which those having expert knowledge alone can answer.

JOHN M. KELLOGG, P. J., and H. T. KELLOGG, J., dissent, the latter in part.

APPEAL by the defendant, General Electric Company, from a decision and award of the State Industrial Commission, made on the 17th day of June, 1920.

Richmond Moot, for the appellant.

Charles D. Newton, Attorney-General [*Bernard L. Shientag*, counsel to State Industrial Commission, and *E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

There is no dispute that the claimant was injured in the course of his employment in a manner to entitle him to compensation. The accident occurred on the 14th day of June, 1919. The injury is described as a "contused and lacerated right wrist," and the only question presented upon this appeal is whether the Commission may make an award for an injury in excess of the proportionate loss fixed by the testimony of the physicians, upon the personal examination by one of the commissioners. The greatest possible loss of use of the hand, due to the injury to the wrist, was placed at thirty-three and one-third per centum by the physicians, ranging from that down to twenty-five per cent. There is no testimony before the Commission from which any greater loss of use may be found. Deputy Commissioner Boyle has, however, made a personal examination of the claimant's hand and, ignoring the testimony of the physicians, has fixed it at forty per centum. None of the facts on which this determination is made rests upon sworn testimony; it is all based upon the statement of this deputy commissioner. He says: "The claimant in this case has been before me and examined by me seven or eight times since July 23, 1919, and I have found on all examinations a marked loss of gripping power in the right hand, which has not in my opinion improved although there has been some improvement in the condition of coldness and perspiration which has been present in the hand. I find that this loss of power of the hand is equivalent to 40 per cent of the useful function of the hand and I make an award for 97.6 weeks at \$20 per week."

Various hearings were had in reference to this case, and counsel insisted that the award be confined to the limits fixed by the testimony, but the Commission has ratified the award, and we are asked to determine upon this appeal whether the Commission may fix the extent of injuries without regard to the evidence in the record. In condemnation proceedings,

where the commissioners are authorized to view the premises, and to take into consideration the evidence in connection with such view, it is probably true that the commissioners are not bound by the testimony of witnesses as to the value of the property taken, though it would be rather an extraordinary case where the commissioners would be justified in making an award in excess of the estimates placed upon the values by witnesses testifying in behalf of the parties interested. But in these compensation cases, where the question of the extent of the injuries depends upon highly technical knowledge, no good reason suggests itself why the Legislature should have contemplated such action as is here under consideration. The statute does not authorize the Commission to view an injury and determine its extent. Subdivision 3 of section 15 of the Workmen's Compensation Law (as amd. by Laws of 1917, chap. 705)* particularly specifies the extent of the injuries to be compensated by particular allowances, and then provides that "for the partial loss or the partial loss of the use of a hand, arm, foot, leg or eye, compensation therefor may be awarded for the proportionate loss or proportionate loss of the use of such hand," etc., but it nowhere delegates to the Commissioner the power to arbitrarily determine the proportionate loss, and such a power cannot be presumed to have been granted, for the constitutional requirement of due process of law contemplates the protection of the life, liberty and property of the citizen against the acts of mere arbitrary power in any department of the government. (U. S. Const. 14th Amendt. § 1; State Const. art. 1, §§ 6, 19; *Westervelt v. Gregg*, 12 N. Y. 212; *Bertholf v. O'Reilly*, 74 id. 509, 519.) Section 65 of the act provides that "each commissioner and deputy shall, for the purposes of this chapter, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony." These powers all contemplate the bringing before the Commissioners of the necessary facts for the determination of the questions involved, not to usurpation of the power to determine from a mere personal examination questions which legitimately belong to

* Since amd. by Laws of 1920, chaps. 532, 533.— [REP.]

the field of expert testimony. Section 68 provides that the Commission "in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." It is, however, provided in section 20 (as amd. by Laws of 1919, chap. 629) that "upon a hearing pursuant to this section either party may present evidence and be represented by counsel," and this, of course, contemplates that the evidence actually produced must be taken into consideration, and that counsel shall have the rights customarily exercised by counsel; shall have the right to cross-examine the witnesses, and to have all the evidence upon which the Commission acts spread upon the record. This is necessary to the appeal provided for in section 23 of the act (as amd. by Laws of 1917, chap. 705), and the court in *Matter of Carroll v. Knickerbocker Ice Co.* (218 N. Y. 435) says that there "'must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by [the] court.'"

There is clearly no evidence in this record of a sound, competent and recognizedly probative character to sustain the finding that the claimant's hand was injured to the extent of forty per cent of its capacity; there is merely the conclusion of a deputy commissioner, unsustained by any evidence in the record. He does not lay before this court the groundwork of fact on which his conclusion is based; he was not sworn, was not subjected to examination or cross-examination. So far as the record goes it appears that his conclusion was reached after the hearing was closed, and without any one knowing that he contemplated making any personal examination of the claimant.

The award should be reversed and the case returned to the Commission for a determination upon the evidence which appears in the record.

All concur, H. T. KELLOGG, J., in result on the ground that the loss of use presented a question which those having expert

knowledge alone could answer; and does not agree that the Commissioner is not in other cases entitled to use the evidence of his senses to make a determination, except JOHN M. KELLOGG, P. J., dissenting.

Award reversed and matter remitted to the Commission for further action.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of CHRIST SVOLOS, Respondent, for Compensation under the Workmen's Compensation Law, *v.* HARRY MARSCH & Co., Employer, and CONTINENTAL CASUALTY COMPANY, Insurance Carrier, Appellants.

Third Department, March 2, 1921.

Workmen's Compensation Law — relation of parties — independent contractor not entitled to compensation for injury sustained — jurisdiction of State Industrial Commission.

Where it is conceded that a claimant employed under a contract to paint a building for a third party is an independent contractor, and he testifies as to an alleged agreement on the part of his employers to protect him by compensation insurance, but it is not claimed that the promise was made as an inducement for the signing of the contract, and it appears that if anything was said in relation thereto it was subsequent to the signing and delivery of the contract, the claim should be dismissed.

The State Industrial Commission is not a court of equity; it has no power to set aside the deliberate contracts of parties, or to close its eyes to the terms and conditions of such contracts. When it appears that a contract constitutes the claimant an independent contractor the powers of the Commission are at an end.

APPEAL by the defendants, Harry Marsch & Co. and another, from an award of the State Industrial Commission, made on the 28th day of February, 1920, affirming an award made on the 31st day of October, 1919.

Jacobson & McCormick [Karl A. McCormick of counsel], for the appellants.

Charles D. Newton, Attorney-General [E. C. Aiken, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

Harry Marsch & Co. are painting contractors located in the city of Buffalo. On the 18th day of August, 1919, they entered into an executory contract in writing with Christ Svolos, who held himself out as a painting contractor, by the terms of which Svolos undertook to paint the Peoples Storage Holder "according to specifications attached, the same forming a part of this contract, and to furnish all labor, ropes, brushes and tools to complete same. The work to be started at once. It is agreed and understood between Marsch & Co. and Christ Svolos there being any delay of more than eight hours on this work, except weather conditions, Marsch & Co. are at liberty to go on and complete same without any further notice, for the sum of one thousand (\$1,000) dollars, payments to be made as follows: When one coat is on complete, to receive one-half of the amount, less 10%; when second coat is complete, balance to be paid in fifteen days."

Svolos borrowed some ropes and scaffolding material of Marsch & Co., and entered upon the performance of the work, but before he became entitled to any part of the payments stipulated for a rope broke and he was seriously injured. He made a claim for compensation, and the State Industrial Commission has made an award. The employer and the insurance carrier appeal from such award. The accident happened on September 5, 1919.

The learned Attorney-General concedes that under the terms of the written contract the claimant was not an employee but an independent contractor. It is suggested, however, that because the claimant testified as to some alleged agreement on the part of Marsch & Co. to protect him by compensation insurance the award of the Commission may be sustained. It is not claimed that any such agreement was made as an inducement for the acceptance of the contract; if anything was said at all it was subsequent to the signing and delivery of the contract, and Marsch & Co. deny that anything of the kind was said at all, and there is no suggestion of any consideration for this alleged modifying agreement. This court has held repeatedly that the fact of employment was essential to the jurisdiction of the State Industrial Commission in making an award; that this fact, where it was put

in issue, must be established by common-law evidence sufficient to support a verdict by a jury, and there is no evidence whatever in the present case to show that the contract was the result of fraud, or that it did not correctly define the relations of the parties. The State Industrial Commission is not a court of equity; it has no power to set aside the deliberate contracts of parties, or to close its eyes to the terms and conditions of such contracts. When it appears, as in the present case, that the parties have entered into a contract for the performance of work under circumstances which the courts have determined constitute the workman an independent contractor its powers are at an end, and it should dismiss the claim. The case of *Matter of Litts v. Risley Lumber Co.* (224 N. Y. 321) is sufficient authority for this proposition.

The award appealed from should be reversed and the claim dismissed.

All concur; JOHN M. KELLOGG, P. J., in result.

Award reversed and claim dismissed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of HENRY QUICK, Respondent, for Compensation under the Workmen's Compensation Law, v. THE FRED E. ILLSTON ICE COMPANY, Employer, and ICE DEALERS MUTUAL INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, March 2, 1921.

Workmen's Compensation Law — accidental injury — freezing of hands — exposure at low temperature while cutting ice — when failure to give notice not prejudicial.

The freezing of one's hands while engaged in floating ice by the aid of a pike pole, at a time when the thermometer registered fourteen degrees below zero, is an accident within the meaning of the statute.

That defendants were prejudiced by notice which gave them inadequate time to procure evidence, on a second hearing, was not shown, where the insurance carrier was represented at the hearing in question and made no

suggestion of the point now urged, or at least asked for no adjournment for the purpose of procuring evidence which, if produced, could change the result.

APPEAL by the defendants, The Fred E. Illston Ice Company and another, from an award of the State Industrial Commission made on the 7th day of May, 1920.

James W. Smith, for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of-counsel], for the respondents.

WOODWARD, J.:

The claimant suffered injuries to both his hands while engaged in floating ice by the aid of a pikepole, on the 31st day of January, 1920. The thermometer at the time of the injury registered fourteen degrees below zero, and the accident is found to have been due to the necessity of holding on to the pikepole in such a manner as to expose the claimant to an added hazard. His fingers were frozen and the Commission has allowed an award for a period of ten and one-third weeks. This court is committed to the proposition that the freezing of one's hands while engaged in a hazardous employment is an accident within the meaning of the Workmen's Compensation Law. (*Days v. Trimmer & Sons, Inc.*, 176 App. Div. 124; *Hernon v. Holahan*, 182 id. 126; *Campbell v. Clausen-Flanagan Brewery*, 183 id. 499, 500; *Richardson v. Greenberg*, 188 id. 248, 252.)

The suggestion that the defendants were prejudiced by a notice which gave them inadequate time to procure evidence, on a second hearing, need not be very seriously considered. The insurance carrier was represented at the hearing in question and made no suggestion of the point now urged, or at least asked for no adjournment for the purpose of procuring evidence which, if produced, could change the result.

The award should be affirmed.

Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of JOSEPH P. DONOVAN, Respondent, for Compensation under the Workmen's Compensation Law, v. ALLIANCE ELECTRIC COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.

Third Department, March 2, 1921.

Workmen's Compensation Law — accidental injury — sleeping sickness following blow on head does not result from injury — purpose and theory of Workmen's Compensation Law.

An employee who sustained a blow on his head and subsequently developed sleeping sickness is not entitled to an award for the disease, which is infectious and not the result of trauma, where the finding of the State Industrial Commission that the sleeping sickness was "caused or activated by the injury received while engaged in the regular course of employment," is without support in the evidence.

The purpose of the Workmen's Compensation Law, sanctioned by the amendment of the Constitution, was to provide compensation for industrial accidents; for accidents inherent in the modern system of production, and not for the pensioning of those who suffer from disease not caused by such accidents.

The theory of the Workmen's Compensation Law is that the accidents of an industry are proper overhead charges, and the effort of the Commission to enlarge the scope of the statute and to impose the burden of infectious disease upon the industrial life of the State ought not to receive the sanction of the court.

JOHN M. KELLOGG, P. J., and KILEY, J., dissent.

APPEAL by the defendants, Alliance Electric Company and another, from a decision and award of the State Industrial Commission, entered in the office of said Commission on the 23d day of June, 1920.

The matter was remitted to the Commission after the reversal of a former award. (See 191 App. Div. 303.)

James B. Henney [*William H. Foster* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, of counsel], for the respondents.

WOODWARD, J.:

I am unable to find evidence justifying the conclusion that a man whose head was bumped, and who subsequently developed sleeping sickness, is entitled to compensation for such sickness. Whatever disability resulted from the injury to the head is, of course, compensable, but neither the Constitution of this State, amended to permit of the Workmen's Compensation Law, nor the statute contemplates payment for diseases which are not the natural and unavoidable result of accidental injuries, as defined by subdivision 7 of section 3 of the Workmen's Compensation Law (as amd. by Laws of 1917, chap. 705). The Constitution (Art. 1, § 19) provides that nothing shall prevent the Legislature from providing "compensation for injuries to employees or for death of employees resulting from such injuries," making no mention of disease, and the statute provides (§ 3, subd. 7) that injuries "mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." The wholly undisputed testimony of Dr. Kennedy is to the effect that sleeping sickness is the result of an infectious disease, and that it is in nowise the result of trauma, and the finding of the Commission, that the sleeping sickness was "caused or activated by the injury received while engaged in the regular course of his employment," is without support in the evidence. Dr. Kennedy's testimony is that sleeping sickness is not the result of trauma, but of infection; that the fact that the claimant developed sleeping sickness following the bump upon his head is merely a coincidence, and the finding of the Commission is not that the disease was caused by the accident, but is in the disjunctive, that it was "caused or activated by the injury." Of course, this is not a finding that it was "such disease or infection as may naturally and unavoidably result" from the injury; it is not a finding that it was the cause of the disease at all. It is merely a finding that it caused or activated an infectious disease, and is not a finding of either of these alleged results. It is generally understood that an infection does not result from a mere bump in any event. Dr. Kennedy is very definite in his testimony that traumatism is not involved in sleeping sickness, so that the finding that the claimant is

afflicted with sleeping sickness, caused or activated by the bumping of his head, is not only unsupported by the evidence, but it fails to establish that there is "such disease or infection as may naturally and unavoidably" result from the accident which concededly befell the claimant. Sleeping sickness according to the testimony in the record is not a natural result of the bump which the claimant received; no evidence is elicited that it could even activate an infection already existing. It is "only * * * such disease or infection as may naturally and unavoidably result" from the accident that is contemplated, and we have no right to extend the statute to cases not within the language of the law.

The claimant is suffering from a disease which comes to a considerable number of people. It is comparatively little known, but recent experience has demonstrated, according to Dr. Kennedy, that it is entirely apart from traumatism, and the alleged fact that this claimant never had any previous illness is not evidence that he would not have had sleeping sickness if this accident had never happened. The purpose of the statute, as sanctioned by the amendment of the Constitution, was to provide compensation for industrial accidents; for accidents inherent in the modern system of production, and not for the pensioning of those who suffered from disease not caused by such accidents. The theory of the law is that the accidents of an industry are proper overhead charges (Const. art. 1, § 19), and the effort of the Commission to enlarge the scope of the statute and to impose the burden of infectious disease upon the industrial life of the State ought not to receive the sanction of this court.

The award should be reversed, and the Commission be directed to compensate the claimant for the injuries to his head, not for the disease which is not shown to have resulted from the injury.

All concur, except JOHN M. KELLOGG, P. J., and KILEY, J., dissenting.

Award reversed and matter remitted to the Commission for action as per opinion.

MICHAEL J. K. REILLY, Respondent, v. HENRI GUTMANN
SILKS CORPORATION, Appellant.

Second Department, March 18, 1921.

Pleadings — breach of contract of employment — failure to divulge information to employer — bill of particulars — court will not compel defendant to give particulars as to information based on admissions or declarations of plaintiff and withheld by him.

Where in an action for breach of contract of employment the defendant alleges that the plaintiff was discharged because he violated his agreement in failing to divulge information valuable to the defendant in his business, and it appears from the bill of particulars voluntarily served by the defendant that the plaintiff had stated to him that he had certain valuable information but would not divulge the same, the defendant should not be compelled to serve a further bill of particulars as to said information which the plaintiff refuses to furnish him.

APPEAL by the defendant, Henri Gutmann Silks Corporation, from an order of the Supreme Court, made at the Queens Special Term and entered in the office of the clerk of the county of Queens on the 21st day of February, 1921, denying its motion for an order directing the plaintiff to accept service of a bill of particulars voluntarily furnished by defendant in response to plaintiff's motion for such bill of particulars, and directing defendant to serve a further bill of particulars.

Luke D. Stapleton [*Mark Ash* with him on the brief], for the appellant.

R. Randolph Hicks [*Earl E. Keyes* with him on the brief], for the respondent.

KELLY, J.:

This is an action in which plaintiff alleges a written contract by which he was hired as assistant general manager of defendant for the term of three years from November 1, 1917, at the rate of \$5,000 per year and an additional sum equal to five per cent of the net profits of the defendant, to be determined by defendant's balance sheet at the end of each year. Plaintiff alleges that he entered upon the performance of his duties under the contract and duly performed the same, but that

he was wrongfully discharged on June 12, 1919. He alleges damage in the sum of \$108,433.16, for which sum he asks judgment.

Defendant's answer, so far as it is material to the questions presented by this appeal, admits the making of the contract and plaintiff's discharge on or about June 12, 1919, but alleges that he was discharged because he broke and violated the agreement and did not fulfill its terms, conditions and obligations. The defendant sets out in the answer various alleged grounds of discharge.

The plaintiff moved for a bill of particulars of the defendant's charge that plaintiff broke and violated the agreement, in addition to the details set forth in the answer, and the defendant voluntarily served a bill of particulars upon the plaintiff's attorneys, which was returned upon the ground that it was insufficient. The defendant gave notice of motion for an order directing plaintiff to accept the bill of particulars served, and the learned justice at the Special Term says, in his opinion, that he thinks it is sufficient except as to paragraph 5 of the plaintiff's demand. He directs that further particulars be given as to that paragraph, granting plaintiff's motion to that extent, and stating, "Such bill of particulars when furnished shall be deemed in addition to the bill already given." Nevertheless he denies the motion to compel plaintiff to accept the bill already given. The order appealed from follows the language of the opinion.

The obvious intention of the learned justice is to find that the bill of particulars served is sufficient, except as to the particulars in paragraph 5 of the plaintiff's demand, but a literal reading of the order leaves the plaintiff without the particulars voluntarily furnished by defendant and found sufficient.

Let us consider the only difference between the learned justice at Special Term and the defendant, appellant.

One of the alleged reasons for plaintiff's discharge is stated in the answer as follows: "That among the other duties of the plaintiff as assistant general manager of the defendant, and which he was required to do and perform by the defendant, was the communication to the defendant through its president and general manager, Henri Gutmann, of information obtained

regarding transactions in the business of dealing and trading in silks and other textiles, which information was of great benefit to the defendant in deciding whether to purchase goods or not, but which information the plaintiff for months previous to June 12th, 1919, neglected and refused to give to the defendant and June 6th, 1919, and thereafter declined positively and finally that he would not give to the defendant in the future."

And this is somewhat amplified in the bill of particulars served, as follows: "(a) In that plaintiff neglected and refused to give defendant during the period aforesaid prior to June 12, 1919, and on June 6, 1919, positively and finally declared he would not give in the future information which was stated by plaintiff to defendant on June 6, 1919, in substance to be inside information of importance which he had from various sources concerning transactions by persons in the same trade as defendant (referring to the purchase and sale of silks and other textiles similar to that dealt in by defendant); which information plaintiff then stated he obtained continuously through his many friends in the trade, and that he regarded such information of great benefit to defendant and its business, but which information plaintiff then stated he had not given to defendant in the 'past few months' (referring to a period prior to said June 6, 1919) for the reason that he had lost confidence in Henri Gutmann, the defendant's general manager and president; which information as stated by plaintiff as aforesaid, and the sources thereof were substantially of the same kind as those which plaintiff had theretofore from about November 1st, 1917 (when he entered into defendant's employ) until the 'past few months' (prior to June 6, 1919) — communicated from time to time to defendant through its president and general manager aforesaid, and which information, and the sources thereof were essential and necessary and of benefit to defendant in determining purchases and sales by defendant, of merchandise similar to that purchased and sold by others in the same trade, and the prices to be paid on the purchase of such merchandise and the prices at which such merchandise should be sold."

This is the information furnished by the defendant in answer to plaintiff's demand No. 5, which is the only demand

concerning which the learned justice criticizes the bill of particulars furnished.

Plaintiff's demand 5 is as follows: "5. State exactly what information greatly beneficial to the defendant or which would have been greatly beneficial to the defendant it was that the plaintiff had obtained regarding transactions in the silk business previous to June 12, 1919, which the plaintiff had neglected and refused to give to the defendant, as claimed and alleged in paragraph VII of the answer herein and re-alleged in paragraph XIII thereof."

The learned justice at Special Term says defendant should furnish plaintiff with "the information which plaintiff had obtained regarding transactions in the silk business previous to June 12, 1919, which plaintiff neglected and refused to give to the defendant."

Defendant's president makes oath that it is impossible for him to give any further particulars as to this information which it is charged plaintiff refuses to give defendant.

The allegation in the complaint and in the bill of particulars voluntarily served, is that plaintiff on June 6, 1919, stated to the defendant that he had acquired information of importance and benefit to defendant which he had not given to defendant, which information as stated by plaintiff and the sources thereof were the same as had been theretofore disclosed by plaintiff to defendant since the making of the agreement. This is the refusal as stated in the bill of particulars, and in the answer the defendant alleges that plaintiff declined positively and finally to give to defendant this information.

It seems to me that the defendant must stand or fall upon his allegation of fact in the answer and in the bill of particulars served. He alleges that the plaintiff on June 6, 1919, stated to defendant that he, plaintiff, at that time had certain information regarding transactions in the business of dealing and trading in silks and other textiles; that he, plaintiff, regarded the information as of great benefit to defendant and its business; that the information in his possession was similar to that theretofore obtained by him during his employment and communicated by him to defendant for the benefit of its business. To compel the defendant to give the particulars

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of information which plaintiff asserted he had obtained, but which he refused to divulge to defendant, seems a vain thing. If, on the trial, the court or jury found as matter of fact that the plaintiff made the statements which it is alleged he made, the question will be whether he told the truth. If he had such information, it was his duty to give his employer the benefit thereof, and refusal would be a ground of complaint against him. If he had such information, he, and he alone, can tell what it was. Defendant is making the charge based upon alleged admissions or declarations by plaintiff. I cannot see how the court can order defendant to give the particulars where defendant's alleged grievance is that plaintiff refuses to furnish him with the particulars.

The order should be reversed, with ten dollars costs and disbursements, and defendant's motion to compel acceptance of the bill of particulars heretofore served by defendant granted, with ten dollars costs.

MILLS, RICH, PUTNAM and BLACKMAR, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and defendant's motion to compel acceptance of the bill of particulars heretofore served by defendant granted, with ten dollars costs.

ADELAIDE WALL, Appellant, v. INTERNATIONAL RAILWAY COMPANY, Respondent.

Fourth Department, March 9, 1921.

Street railways — duty of alighting passenger passing to rear of car injured by oncoming car on another track — when guilty of contributory negligence as matter of law.

A passenger alighting from a street car and passing around the end thereof towards another track upon which a car may be approaching from an opposite direction must be satisfied that the way is clear before passing into the danger zone.

The mere fact that such passenger did not actually get upon or within the rails of the other track before she was injured by a car coming from an opposite direction, may not be invoked to exonerate her from the charge

of being guilty of contributory negligence as matter of law under the circumstances of this case, since she actually got into the path of the oncoming car.

KEUSE P. J., and DAVIS, J., dissent, with opinions.

APPEAL by the plaintiff, Adelaide Wall, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Erie on the 29th day of October, 1919, dismissing the complaint at the close of the plaintiff's case.

Charles W. Strong, for the appellant.

James C. Sweeney, for the respondent.

LAMBERT, J.:

The full presentation of the facts of the case, in the dissenting opinion of Mr. Justice DAVIS, is adequate to the application of the controlling rules of law.

It may be conceded that the proof of speed, failure of warning and violation of the ordinances was sufficient to carry the case to the jury upon the question of the defendant's negligence. The charge of contributory negligence of the plaintiff is the serious inquiry here.

It is conceded that the plaintiff, upon alighting from the car, passed to the rear thereof and into a position where she was struck by an oncoming car upon the car track.

The nonsuit was granted upon the authority of *Reed v. Metropolitan Street R. Co.* (180 N. Y. 315) and *Schasel v. International R. Co.* (185 App. Div. 196; *affd.*, 230 N. Y. 538).

The rule as laid down in the *Reed* case is: "A person passing behind the rear of a car and stepping onto the track where a car may be approaching from the opposite direction, is bound to satisfy himself that the way is clear."

This is but another way of stating that a person so conducting himself proceeds at his peril.

The statement quoted, as to stepping upon the far track, obviously applies to a case like this, where the plaintiff did not actually get upon or within the rails of the track, but so close as to be in the path of the approaching car, and thereby sustained injury. In other words, the mere fact that the plaintiff did not actually get upon the track may not be invoked to exonerate her from the charge of contributory

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negligence. She did get into the path of the car. Her conduct brought her within the reason and application of the rule enunciated in the *Reed* and *Schasel* cases cited.

The judgment should be affirmed, with costs.

All concur, except KRUSE, P. J., and DAVIS, J., who dissent, each in a separate opinion.

DAVIS, J. (dissenting):

The plaintiff was nonsuited on the trial and judgment entered for the defendant. I cannot concur in the decision of the majority to affirm.

The plaintiff was a passenger who had alighted from defendant's street car and was injured by being struck by a car passing on another track. The learned trial justice granted the motion for nonsuit at the close of the plaintiff's case, and relying on his recollection of the evidence, stated in substance that the car from which the plaintiff alighted had started at the time of the accident, that she had gone upon the track without the slightest effort to look, and was struck before she had an opportunity to look to determine that it was a safe place, and, therefore, she was guilty of contributory negligence as a matter of law. He was mistaken in his facts, and, therefore, I believe arrived at the wrong conclusion, for the plaintiff never reached the second track; she did look; and at best the evidence is in dispute whether the car from which she had alighted had yet started.

Let me somewhat more fully state the facts, taking them and the inferences to be drawn therefrom in the light most favorable to the plaintiff, as we are bound to do, she having been nonsuited. (*McDonald v. Metropolitan Street R. Co.*, 167 N. Y. 66, 68; *Sesselmann v. Metropolitan Street R. Co.*, 65 App. Div. 484.)

The plaintiff, an elderly woman, boarded an Elmwood avenue car in the city of Buffalo on February 1, 1917. She was going on a visit to some friends, and alighted at the usual stop at or near the intersection of Bedford avenue. There were other passengers getting off the car, the day was cold and there was snow on the ground. The car from which she alighted was going north. The home of her friends was to

the west, so she passed to the rear of the car and approached the south-bound track. The distance between the farther rail of the north-bound track and the near rail of the south-bound track was five feet, but the overhang of the car was twenty-three and one-half inches, and when she reached a position where she could look to the north past the car from which she had alighted, she looked and stood still, being somewhere in the space between the north-bound and south-bound tracks, but not within two feet of the nearest rail of the latter track. As she reached this point a south-bound car, then not over fifty feet away, approached her without slackening speed, giving no warning, and plaintiff threw up her hands and the car struck her left hand, causing a fracture of her wrist. The car which was running very fast, one witness said fifty feet in half a second, ran from one hundred to one hundred and fifty feet before it stopped. An ordinance then in force provided as follows: "Every driver or other person having the charge and the control of any street railway car within the City of Buffalo while approaching and passing any other street railway car standing for the discharge or reception of passengers shall sound the gong and reduce the speed of his car to a rate not to exceed five miles per hour." (Buffalo Ordinances, chap. 4, § 44, as amd. May, 1915, in effect June 4, 1915.)

If we are to say that the plaintiff was guilty of contributory negligence as a matter of law, we must state with some reasonable exactness what she was bound to do, in the exercise of reasonable care, when she alighted from the car and desired to proceed on her journey, which lay to the west. Three courses were open to her: *First*. She might stand still in the street where she alighted on this cold winter's day, while other passengers got off and others boarded the car, and until the conductor and motorman in the course of time elected to proceed, so that she might have a view to the north to see if a south-bound car was coming. This, besides being inconvenient and uncomfortable, would, of course, leave her where she would be exposed to the dangers of vehicular traffic, and perhaps under the stringent rule contended for here, make her guilty of contributory negligence as a matter of law if she was injured by a passing vehicle. *Second*. She could

go to the curb or sidewalk to the east in the opposite direction from which her journey lay, and there wait until the car moved on and she could become absolutely certain that it would be safe to cross the street and proceed to her destination. This would, of course, imply that the street railway company had the exclusive right to use the street at that point as long as it desired. *Third.* She might proceed cautiously to the west, being vigilant at all times that she did not get on the other track in front of any approaching car, relying for her safety not alone on what her own observation by looking might disclose, but upon the protection which the law gave her in requiring one car approaching another discharging passengers to proceed slowly and give adequate warning of its approach, and upon the assumption that the company, whose patron she was, would not expose her to an imminent danger at a point where she was permitted to alight from its car. I decline to advise her, as a matter of law that she was bound to adopt one of the first two courses suggested. Yet that is the practical result of holding that she was guilty of contributory negligence. It is suggested that she might have gone farther to the rear of the car where she would have a better view of the track. How much farther to the rear must she go? Since we are holding that she is negligent as a matter of law, we must advise her just what she should have done to exercise reasonable care, or else we have invaded the right of the jury to determine under given conditions what constitutes the vigilance and care of an ordinarily prudent person.

The proximate cause of the accident was either the negligence of the plaintiff or the violation of law on the part of the defendant. It is, under the circumstances disclosed, essentially a question of fact.

No one will claim, I presume, that after alighting the plaintiff was required by law to stand in one place; she might at least walk about as long as she did not go upon the other track or so near it that a car would strike her, and not be chargeable with contributory negligence. In exercising this privilege (which I believe any court would award her) the plaintiff stepped into a position of safety. Had she

remained practically still she would not have been injured, but the sudden appearance of the car apparently startled her and caused her to throw up her hands to fend off the onset of this sudden danger. It was a perfectly natural involuntary movement under the circumstances, yet in making it her arm was struck by a car which was coming at an illegal rate of speed and had given no warning of its approach. In that instant of time, by that involuntary movement of her arms, did she become guilty of contributory negligence as a matter of law? I cannot so hold.

The court below relied upon *Reed v. Metropolitan Street R. Co.* (180 N. Y. 315), and it is urged by the respondent's counsel here as furnishing authority for sustaining the judgment. The facts are entirely different in the *Reed* case, and the doctrine laid down there does not apply here. In that case the passenger alighting passed to the rear of the car and went on the south-bound track where he was struck, without looking north to see if anything was coming. He was actually upon the track and his body was struck. The rule laid down by Judge BARTLETT is this (p. 317): "A person passing behind the rear of a car and stepping onto the track where a car may be approaching from the opposite direction, is bound to satisfy himself that the way is clear. It is apparent that the slightest caution on the part of this plaintiff would have advised him of the presence of the approaching car and avoided this accident."

The record in the *Reed* case shows, I believe, that the car which struck the plaintiff was proceeding at not to exceed two miles an hour, and the motorman rang the gong continuously in approaching and passing the standing car. How then can the *Reed* case be an authority controlling in the decision of the case under consideration? At the expense of being charged with repetition, let me state again that the plaintiff had not yet reached the south-bound track; she had stopped and was looking in a position of apparent safety; she was exercising caution; she received no warning by gong or other signal; the motorman was not observing the law as to speed. Where is there resemblance as to facts, or where is the doctrine in the *Reed* case that may be properly applied here?

In *Schasel v. International R. Co.* (185 App. Div. 194;

affd., 230 N. Y. 538), a case in this department which is also urged as authority for affirmance, the plaintiff was between the rails of the track when struck. In that case the plaintiff's evidence was contradictory and improbable, as it always is when a person having a clear view of an approaching object states he looked and saw nothing. It is often difficult to adhere strictly to abstract legal principles even if sound, where the merits in a case are lacking. Though the majority of the court went to the limit of the doctrine of contributory negligence *per se* to reverse the judgment and dismiss the complaint, undoubtedly a just result was arrived at in the *Schasel* case in view of the evidence. The plaintiff there was held "negligent as matter of law in failing to look for a north-bound car from a safe place between the two sets of tracks where the other car did not obstruct his view." The plaintiff in this case did look at that point.

The other leading cases following the rule of the *Reed* case are *Maynard v. Rochester R. Co.* (136 App. Div. 212); *McGreedy v. New York City R. Co.* (113 id. 155), and *Axelrod v. New York City R. Co.* (109 id. 87). In the *Maynard* case the plaintiff walked upon the track without stopping, although she claimed she looked, and her evidence was regarded by the court as rather incredible; but she apparently got upon the track in front of the approaching car, and the judgment in her favor was reversed and a new trial ordered, but not entirely upon questions of law. (See 143 App. Div. 957.) In the *McGreedy* case the plaintiff's intestate was killed and the evidence disclosed that he was struck when he went upon the track with the car coming a short distance away, although he had opportunity to see the approaching car before he got upon the track. The plaintiff was then required, in a death case, to assume the burden of showing the person killed free from contributory negligence, and the court held that that fact was not established. The same may be said of the *Axelrod* case.

The case most similar in its facts to the instant case, it seems to me, is *Pelletreau v. Metropolitan Street R. Co.* (74 App. Div. 192; affd., 174 N. Y. 503). There the plaintiff, a school girl, alighted from a north-bound car in New York city and started toward the west side of the street. A friend

walking about six feet in advance succeeded in crossing the south-bound track in safety but before the plaintiff had reached the nearest rail of that track she was struck by a south-bound car. She testified that before attempting to cross she stopped to look for approaching cars and did not discover any. The south-bound car approached without slackening speed and without warning. The space between the overhanging sides of the passing cars between the two tracks was only one foot three inches, and the testimony on the part of the defendant was that the maximum speed of the car was seven miles per hour. In affirming the judgment in favor of the plaintiff, the court held that it could not be said under these circumstances as a matter of law that she was guilty of contributory negligence.

That it is ordinarily a question of fact to be determined by the jury, where a person is struck by a street car while approaching or upon a track and the person injured has exercised some degree of care and vigilance, is held by a long line of authority, particularly where there is gross negligence on the part of the defendant. (*Provoost v. International R. Co.*, 151 App. Div. 240; *affd.*, 208 N. Y. 611; *Craven v. International R. Co.*, 100 App. Div. 157; *Stevens v. Union R. Co.*, 75 id. 602; *affd.*, 176 N. Y. 607; *Dobert v. Troy City R. Co.*, 91 Hun, 28; *Beers v. Metropolitan Street R. Co.*, 104 App. Div. 96; *Sesselmann v. Metropolitan Street R. Co.*, 65 id. 484.)

A person passing to the rear of a street car and getting entirely upon another track, ordinarily has had an opportunity at some time to see and to exercise care; and the general rule is that a person who thus blindly walks into a danger which the exercise of due care would have enabled him to avoid, is guilty of contributory negligence as a matter of law; or, to state the rule more broadly, if a person knows that he is in a place of danger; it is his duty to exercise some care for his own safety, and if he takes no care whatever, he is then guilty of contributory negligence. (*Volosko v. Interurban St. R. Co.*, 190 N. Y. 206, 209.) But if he exercises some degree of vigilance and care, it then becomes a question of fact, and a party has a right to have it submitted to the body designated by the Constitution to try such issues,

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subject, however, to a review by the court as to whether the weight of evidence sustains the verdict.

To affirm the judgment we must adopt the broad principle that if a person goes behind a standing car from which he has alighted, and gets on or near another track where cars run in an opposite direction, and is injured, he is guilty of contributory negligence as a matter of law, no matter what degree of vigilance or care he exercises or how great the negligence of those operating the car which struck him. No court has gone that far and the doctrine I believe is unsound.

For the reasons stated I favor reversal and the granting of a new trial.

KRUSE, P. J. (dissenting):

I concur for reversal. As pointed out in the opinion of Mr. Justice DAVIS, the plaintiff was not upon the track of the car which struck her, but between the two tracks. She says she walked around the back end of the standing car from which she had alighted, looked up, saw this car coming fast; she threw up her hands, and the car struck her left hand; that she looked up as soon as she got past the car; that she was then standing in the space between the two tracks; this space was five feet wide and the overhang of the car was twenty-three and one-half inches, leaving a clearance between the two cars of only thirteen inches.

To hold that under such circumstances a passenger is negligent as a matter of law exacts a degree of care beyond what is reasonable, as I think, and extends the rule of contributory negligence farther than any decision of the Court of Appeals cited to sustain this nonsuit.

Judgment affirmed, with costs.

STELLA MAE NEALON, an Infant, by Her Guardian ad Litem,
FRANK B. MAGEE, Respondent, v. JAMES J. NEALON,
Appellant.

Fourth Department, March 9, 1921.

Husband and wife — annulment of marriage — action by wife on ground that she was not of age of legal consent — awarding custody of child to wife — compelling husband to support child — facts showing that husband was guilty parent — Code of Civil Procedure, section 1751, applied.

The court has the power, in an action brought by a wife for the annulment of her marriage on the ground that she was not of the age of legal consent, to award to her the custody and care of the issue of the marriage.

The defendant was the guilty parent, within the meaning of section 1751 of the Code of Civil Procedure, so that an order compelling him to pay toward the support of the child of the marriage was proper, where it appeared that at the time of the marriage he was over the age of legal consent and that the plaintiff was under sixteen years of age and was induced to leave her home without her parents' consent for the purpose of marriage, and that after living together for several months he abandoned the plaintiff without justification.

APPEAL by the defendant, James J. Nealon, from an interlocutory judgment in favor of the plaintiff, entered in the office of the clerk of the county of Steuben on the 9th day of July, 1920, on the decision of the court rendered after a trial at the Steuben Special Term, in so far as said judgment relates to the awarding to the plaintiff of the care, custody and control of the issue of the marriage between the parties, and to the payment of any sum or sums of money by the defendant to the plaintiff for the support of the child of said marriage.

Whiteman & Hill [Floyd E. Whiteman of counsel], for the appellant.

Harry L. Allen, for the respondent.

CLARK, J.:

The parties were married in March, 1919. They were both minors, the plaintiff being under sixteen years of age, and defendant being over eighteen, but under twenty-one. A child was born to them December 5, 1919, and it is still

living. The parties were living at the home of plaintiff's parents when the child was born, and this arrangement was with the consent of defendant. Plaintiff has been at the home of her parents with her child ever since it was born. About two weeks after the baby was born, and during very cold weather, and before plaintiff had the strength to go, defendant requested her to leave her father's house and live elsewhere. Plaintiff asked defendant to wait until spring, and he refused and left the home of her parents, telling plaintiff if she did not go then she would never go. Defendant was not requested to leave the home of his wife's parents, but was welcome there. He simply left his wife and child for no apparent reason excepting that the young mother would not leave at the time he requested it, and the reason she would not go then was because she did not have the strength to move so soon after the birth of her child, and the weather was the coldest of the winter.

Defendant left his wife in December, 1919, and this action was begun in February, 1920. The case was tried in May, 1920, and by the judgment entered July 9, 1920, the marriage was annulled, and the custody of the child was awarded to plaintiff, the mother, and defendant was required to pay three dollars per week toward the support of the child, and with leave to defendant to see the child at least once each month.

Defendant appeals from so much of the judgment as awards to plaintiff the care and custody of her little boy and directs defendant to pay three dollars per week toward his support, and urges that the learned trial court had no authority to make such provisions in the judgment, because defendant was not the guilty party, the marriage having been annulled because plaintiff was under the age of consent.

So far as the provision in the decree awarding the custody of the child to plaintiff is concerned, the position urged by defendant is without merit. This marriage was not void, but merely voidable. It was not a nullity, but was annulled because plaintiff was under the age of consent.

Section 1751 of the Code of Civil Procedure, as amended by chapter 202 of the Laws of 1919, distinctly provides in such a case that "The court, by the judgment or by sub-

sequent order, may award the custody of a child of the marriage to either party as the interests of the child require."

When the case was tried this child was less than six months old, and when the judgment was entered he was just seven months old. Manifestly the best interests of so young a child required that it be kept with the mother.

Defendant urges, however, that even though awarding the custody of the child to plaintiff was justifiable, he could not be compelled to provide for its support for the reason that he was not a guilty parent.

Section 1751 of the Code of Civil Procedure provides that the court can make provision for the maintenance of a child out of the property of the guilty parent, if the marriage shall be annulled. This marriage was annulled and the child is legitimate. Defendant was older than plaintiff at the time of the marriage, being between nineteen and twenty years of age, as stated on the argument, whereas, plaintiff was under sixteen years of age. He was above and plaintiff was below the age of consent. (Dom. Rel. Law, § 7, subd. 1.) The parties resided in Hornell and went to Elmira for the marriage. Plaintiff's parents evidently knew nothing about it for shortly after the marriage her father brought an action to have it annulled which failed because at the time the parties were living together and were seemingly happy and contented. That case was tried before the same justice who tried this case. From the fact that by this judgment the court required defendant to contribute toward the support of his child, the court must have adjudged that, as between the parties, the defendant was the guilty parent. That was a question of fact (*Bickford v. Bickford*, 74 N. H. 448), and the decision of the trial court was not only justified by the undisputed evidence as to his leaving his wife and child less than two weeks after the plaintiff was confined, when because of her weakened condition she could not go with him when he demanded it, but also because of the fact that he had induced a young girl less than sixteen years of age to leave her home without her parents' consent and had taken her for the purpose of marriage, which subjected him to the charge of abduction. (Penal Law, § 70.)

The facts before the trial court fully justified the conclusion

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that defendant was guilty of conduct unworthy of a husband and father and that he was a guilty parent.

The case of *Park v. Park* (24 Misc. Rep. 372), relied upon by defendant, does not help him. In that case the wife brought an action to annul the marriage because the defendant had already a living wife. Alimony was refused because she was not and never had been defendant's wife, the marriage being absolutely void and she had no claim to alimony.

We find no other case in this State at all in point, but in several other States the father has been compelled to support his child in annulment cases even where there was no fraud, when the child was legitimate. (*Bickford v. Bickford*, 74 N. H. 448; *Palmer v. Palmer*, 79 N. J. Eq. 496.)

In the last case, plaintiff, husband and father of an infant child, was under the age of consent when the marriage was solemnized, and he brought action for annulment on that ground. The decree was granted, but provision was made that he should support his child. The court said: "The annulment of the marriage between these people did not make their child illegitimate, and does not take from them the quality of parents. They continue to be the parents of this child, and they are living separately; they will hereafter continue to live separately, not by virtue of any agreement between themselves, but by virtue of a decree of this court. * * * Plaintiff having escaped the burden of supporting his wife, he now seeks to escape the burden of supporting the child whom he acknowledged to be his child by marrying its mother. Such conduct cannot appeal in the least degree to a court of conscience."

The judgment of the trial court should be affirmed, with costs.

All concur.

Interlocutory judgment affirmed, with costs.

AMERICAN WOOLEN COMPANY, Appellant, v. THE STATE OF
NEW YORK, Respondent.

Fourth Department, March 9, 1921.

Canals — appropriation of lands by State by entry thereon — Barge Canal Act, section 4, construed — filing of map not condition precedent to making claim for appropriation of property — claim filed sufficient as claim for damages for permanent appropriation — destruction of water rights at level long existing amounts to appropriation — measure of damages for appropriation — Court of Claims — limitation of actions — failure to file notice of intention to file claim for trespass or temporary taking of property.

The method of appropriating lands for Barge canal purposes by making and filing a map as required by section 4 of the original Barge Canal Act is not exclusive, but the State may appropriate lands by the more summary method of entry and occupation and without notice to the owner.

Accordingly, the filing of a map by the State Engineer under said section is not a condition precedent to the making of a claim for appropriation of property.

Furthermore, the Enabling Acts giving jurisdiction to the Court of Claims to award compensation for lands appropriated for Barge canal purposes show the intent of the Legislature to deal justly with persons whose lands are appropriated and not to deny payment to persons whose lands have not been appropriated by the map filing method.

As the claim was dismissed because barred by the Statute of Limitations, the claimant is entitled to the most favorable view, and the claim filed and proof presented is sufficient to apprise the State that the nature of the claim sought to be established is one for a permanent appropriation.

The destruction of the water rights of the claimant at the level long existing by raising the Oswego river by means of a dam is an appropriation of the property and if property is actually taken by the State for a public use, and the owner is excluded from its possession and loses the rights and benefits to which he was theretofore entitled, then there is an appropriation of the property.

Where there is a permanent appropriation of the property, compensation should be made by allowing as damages the market value of the property actually taken, with the consequential damage resulting to the remainder, giving consideration in the latter item to the value, if any, of the increased head of water now available to the claimant.

The Statute of Limitations has not run against the claim for the permanent appropriation of lands; but the claim for interference with the water

supply caused by the installation of a coffer dam being a mere trespass or temporary taking and not an appropriation, the claimant has lost its right to compensation by its failure seasonably to file a notice of intention to file a claim.

APPEAL by the claimant, American Woolen Company, from a judgment of the Court of Claims of the State of New York, entered in the office of the clerk of said court on the 8th day of March, 1920, dismissing the claims of the said claimant, and, as stated in the notice of appeal, from the decision of the said court upon which the said judgment was rendered.

Davies, Auerbach & Cornell [*Charles H. Tuttle* of counsel; *William Nottingham, Brainard Tolles* and *Martin A. Schenck* with him on the brief], for the appellant.

Charles D. Newton, Attorney-General [*Edward J. Mone, Deputy Attorney-General*, of counsel], for the respondent.

DAVIS, J.:

The claimant is the owner of fifteen and two-tenths acres of land on the Oswego river, situated between two dams long ago created by the State. The boundaries extend to the center of the stream. On this property are large mills, the power for their operation being furnished by the head of water from the upper dam. Between 1909 and 1913 the State engaged in the work of improving the Oswego canal by deepening the channel of the river, as authorized by chapter 147 of the Laws of 1903, and raised the level of the two dams, thereby interfering with the water power of the claimant.

It is admitted that the claimant is the owner of a vested property right, not only in the land itself but to use one-half of the surplus flow of the river impounded by the dam, and to a continued existence of the upper and lower dams at the elevations in 1909. The owner filed a claim for damages caused by this interference with its water rights, a trial was had in the Court of Claims, and its claim was dismissed on the ground that the notice of intention to file a claim was not presented within six months from the time the damage accrued, and that the limitation contained in section 264 of the Code of Civil Procedure bars the giving of a remedy.

It is admitted on the part of the State on this appeal that there has been a "taking" of the appellant's property resulting in damage. The question as to whether the Statute of Limitations has run against the claim depends entirely as to whether the acts on the part of the State constituted a taking, appropriation and use of the property for the benefit of the State for public use, or whether these acts were a temporary taking or trespass. If it was an appropriation, the claim is not barred; and if a trespass, the claimant's rights are lost by its failure seasonably to file a notice of intention to file a claim.

It, therefore, becomes necessary to determine what constitutes an "appropriation" of land by the State for public use, for which compensation must be made under the provisions of article 1, section 6, of the State Constitution. In considering this question it is necessary to examine the legislative enactments on the subject of taking property for the construction and improvement of canals, and particularly the Barge Canal Act (Laws of 1903, chap. 147) and the so-called Enabling Acts (Laws of 1915, chap. 640; Laws of 1916, chap. 420, and Laws of 1918, chap. 606). The original Barge Canal Act in section 4 provides: "The State Engineer may enter upon, take possession of and use lands, structures and waters, the appropriation of which for the use of the improved canals and for the purposes of the work and improvement authorized by this act, shall in his judgment be necessary. An accurate survey and map of all such lands shall be made by the State Engineer who shall annex thereto his certificate that the lands therein described have been appropriated for the use of the canals of the State. Such map, survey and certificate shall be filed in the office of the State Engineer, and a duplicate copy thereof, duly certified by the State Engineer to be such duplicate copy shall also be filed in the office of the Superintendent of Public Works. The Superintendent of Public Works shall thereupon serve upon the owner of any real property so appropriated a notice of the filing and of the date of filing of such map, survey and certificate in his office, which notice shall also specifically describe that portion of such real property belonging to such owner which has been so appropriated. * * * From the time of the service of

such notice, the entry upon and the appropriation by the State of the real property therein described for the purposes of the work and improvement provided for by this act, shall be deemed complete, and such notice so served shall be conclusive evidence of such entry and appropriation and of the quantity and boundaries of the lands appropriated. * * * The Court of Claims shall have jurisdiction to determine the amount of compensation for lands, structures and waters so appropriated." While this section was amended prior to the commencement of the work of improvement and during the progress thereof, no substantial change was made in the general procedure. (See said § 4, as amd. by Laws of 1906, chap. 365; Laws of 1908, chap. 196; Laws of 1909, chap. 273, and Laws of 1911, chaps. 468, 736; since amd. by Laws of 1913, chap. 801.)

Is the filing of a map a condition precedent to the making of a claim for an appropriation of property, or in other words, is the method of appropriation by the making and filing of a map made by statute the only method of appropriating property for the use of the improved canal? We think not. That is a mere matter of procedure, as a proceeding to condemn the property would be. It would give no effect to the words at the beginning of the section, that the State Engineer may enter upon, take possession of and use lands in his judgment necessary for the purposes of the work and improvement. To hold that this method was exclusive, might prevent taking a small amount of land or a structure or property rights inadvertently omitted from the map or imperfectly described or delineated thereon. One method always used by the State in exercising the right of eminent domain is by entry and occupation summarily and without notice to the owner. This was the method heretofore employed in the construction of canals. (See *Van Alstine v. Belden*, 41 App. Div. 123; *affd.*, 161 N. Y. 661; *Watson v. Empire Engineering Corporation*, 77 Misc. Rep. 543; *Miller v. State of New York*, 68 id. 607; *affd.*, 164 App. Div. 522; 223 N. Y. 690.)

The direction by the Legislature to the State Engineer and Superintendent of Public Works, that surveys and maps shall be made and filed and notice given thereof to the owners of property, is intended, we believe, to furnish a more scientific

method of taking property and preserving the record, and in making preliminary estimates of the cost of the work, than by the summary method of entry and occupancy by the engineer or by contractors operating under his direction. By the old method the lands were not always definitely bounded and described, and mistakes were easily made and much litigation resulted between the owners and contractors who exceeded their authority. The present method permits greater certainty in fixing the date of the appropriation, and in making proof for compensation, and is more orderly in its manner of dealing with citizens whose property is seized by virtue of the sovereign power of the State. But the power of the State to take lands by the summary method of entry is not by this statute abandoned, nor was the orderly method prescribed for the State Engineer intended to permit a means of escape from the constitutional duty to make compensation for private property taken for public use. The failure or neglect of the State Engineer to include in a map all the property and rights actually taken, ought not to preclude compensation for what is in fact taken. The question of whether there has been an actual appropriation of land is entirely apart from the procedure ordinarily employed in taking it.

But if we were uncertain as to what interpretation to give the statute of 1903, the Legislature has given to the claimant the right to file its claim and jurisdiction to the Court of Claims to hear and determine it by the Enabling Acts (*supra*). These are practically identical in language and in general permit the court to award compensation or damages on meritorious claims not seasonably filed, "for or on account of the appropriation *or use* by the State of any lands, structures, waters, franchises, *rights, easements* or other property in connection with the improvement" of the Barge canal. The words in italic are in the act of 1916, but are not in the acts of 1915 and 1918. Nothing was said about the claim being dependent upon the filing of a map, nor does it appear that the Legislature intended to make the filing of a map the final test of whether the owner should receive pay for property taken. The evident intent of the Legislature is to be just to the owner and award him compensation for

his property, even though he was delinquent in presenting his claim. It would be hard to reconcile this spirit with the narrow purpose to deny relief to one whose property was actually taken away from him, because some one had not made and filed a map of the property. If the property has been appropriated or used by the State for a public purpose, then the claimant has a right to have its claim passed upon by the Court of Claims, by virtue of these statutes. Having been once filed, continued refileing of the claim was not required. (*Rogers v. State of New York*, 184 App. Div. 340.)

In *Cooper-Snell Co. v. State of New York* (193 App. Div. 192; revd., 230 N. Y. 249) a different statute was under consideration as is pointed out by Judge CRANE. The Enabling Acts are not vital to the claimant's recovery here, for if there was an appropriation of land, both the notice of intention to file claim and the claim itself were apparently seasonably filed, but these acts show the intent of the Legislature to deal justly with persons whose lands are appropriated.

The learned counsel for the State contends that the claim filed and the proof presented do not establish that the property in question was actually appropriated. There is some merit in his position. The claim itself is unnecessarily prolix, vague and ambiguous, and might perhaps as readily be interpreted as a claim for a temporary taking or trespass as for a permanent appropriation; and the claimant made proof to establish a measure of damage for trespass rather than for an appropriation of the land and its appurtenances. But as the claim was dismissed because barred by the statute, the claimant is entitled to the most favorable view we may give to the claim and the evidence supporting it, and we believe it is sufficient fairly to apprise the State that the nature of the claim sought to be established is one for a permanent appropriation. At any rate, if the claim "has its roots in equity and justice," its recognition should not be denied because of technical objections to inapt language in making the claim, or because counsel on the trial made proof of the wrong measure of damages.

As the case stands, with the concession of the State's counsel in the record, we believe there is a claim made for an appropriation of lands and water rights. We follow the authority

of *Oswego & Syracuse R. R. Co. v. State* (226 N. Y. 351) that to destroy property is to appropriate it, and we hold that the destruction of the water rights of the claimant at the level long existing, if they were so destroyed, is an appropriation of the property, and that if property is actually taken by the State for a public use, and the owner is excluded from its possession and loses the rights and benefits to which he was theretofore entitled, then there is an appropriation of the property for which the State is bound to make compensation if a claim is seasonably filed. (*Scriver v. Smith*, 100 N. Y. 471; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Cress*, 243 U. S. 316, 330; *Fulton Light, H. & P. Co. v. State of New York*, 200 N. Y. 400; *Meneely v. Kinser Construction Co.*, 128 App. Div. 799; *United States v. North American Co.*, 253 U. S. 330; *Oswego & Syracuse R. R. Co. v. State*, *supra*.)

The stipulation as to the facts contained in the record was only for the purpose of the motion to dismiss and for the appeal, so it is a question of fact not yet decided whether or not the change in the level of the pool by raising the crest of both dams did actually take lands from the claimant and did deprive it permanently of existing water rights. These questions of fact should be determined by the Court of Claims. If there had been a permanent appropriation of property compensation should be made, applying the usual measure of damages, to wit, the market value of the property actually taken, with the consequential damage resulting to the remainder, giving consideration in the latter item to the value, if any, of the increased head of water now available to the claimant. (*South Buffalo R. Co. v. Kirkover*, 176 N. Y. 301; *Matter of City of New York*, 190 id. 350, 360; *Lehigh Valley R. R. Co. v. Canal Board*, 204 id. 471, 477; *Brainerd v. State of New York*, 74 Misc. Rep. 100, 106; 20 C. J. 756, 766.)

If it should be established that the interference with the rights of the claimant are only temporary, casual or intermittent and there is no permanent use or appropriation of property by the State, and no established existing right has been destroyed, then there has been a mere trespass, and as we held in *Frisbie & Stansfield Knitting Co., Inc., v. State*

of *New York* (189 App. Div. 351) the claim is barred by the statute.

We have not thought it best to discuss the many other questions raised on this appeal. A trial of the issues of fact may either eliminate them entirely or present them in a different light, and any present attempt on our part to settle them would probably result only in embarrassment to the trial court. On the present state of facts, however, we hold, as we have indicated, that the Statute of Limitations has not run against a claim for appropriation of lands. We believe the claim for interference with the water supply caused by the installation of the coffer dam from July 21, 1909, to October 18, 1909, is a mere trespass and not an appropriation of property, and that claimant has lost its right to compensation by its failure seasonably to file the notice of intention to make claim.

The judgment appealed from is, therefore, reversed, with costs, and the claim is remitted to the Court of Claims to determine the fact as to whether there has been an actual appropriation of the lands of the claimant by a permanent entry upon them, by flooding the same with water impounded from the dams; and of the water rights by a destruction thereof, and by permanent interference therewith through changing the levels of the waters impounded, and if so, what compensation therefor shall be allowed.

All concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

THE TURNER-LOOKER COMPANY, Plaintiff, v. ANTONIO APRILE,
Defendant.

Fourth Department, March 16, 1921.

Sales — delivery — pleadings — action to recover price of goods tendered — allegation of time of performance unnecessary — tender of certified registered bonded warehouse certificates of whisky is equivalent to tender of whisky — passing of title — seller may sue for purchase price though whisky refused — Personal Property Law, section 144, subdivision 1, construed — judicial notice of meaning of "sale in bond" — evidence of custom not admissible — custom not shown — recovery of purchase price though whisky sold after action commenced where question not presented by pleadings.

In an action to recover the price of goods sold, begun after the goods had been tendered and refused, it is not necessary to allege in the complaint when the contract was to be performed.

There is a valid tender of delivery of whisky sold in bond by the tender of certified registered bonded warehouse receipts, regularly issued for whisky then in bond, which describe the brand of whisky, the serial number of each barrel, the warehouse stamp number on each barrel, and the number of gallons in each barrel.

Tender of performance, by the tender of delivery of the warehouse receipts, is equivalent to an actual delivery or a tender of physical delivery of the whisky.

The title to the whisky having passed to the defendant, the plaintiff had the right, under subdivision 1 of section 144 of the Personal Property Law, to sue for and recover the contract price of the whisky, even though the defendant had refused to accept it.

The court will take judicial notice of the fact that a sale of whisky in bond means a sale of whisky in a United States bonded warehouse, as described in the Internal Revenue Law.

Said term is so clear, definite and certain that it is not subject to change by evidence of custom or usage; furthermore, the evidence offered by the defendant fell short of the standard required in attempts to vary the meaning of words of a contract by evidence as to a custom.

The defendant cannot raise the question that after the commencement of the action for the purchase price the plaintiff disposed of the whisky, where defendant did not ask to amend his answer when that fact was brought out at the trial.

KRUSE, P. J., and CLARK, J., dissent, with memorandum.

MOTION by the defendant, Antonio Aprile, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division, Fourth Department, in the first instance

after the direction of a verdict in favor of the plaintiff at the close of the case upon a trial before the court and a jury at the Livingston Trial Term in June, 1920.

Averill & Tompkins [William H. Tompkins of counsel], for the plaintiff.

Dallas C. Newton, for the defendant.

HUBBS, J.:

On the date of the sale involved in this case the plaintiff was a wholesale dealer in whisky at Cincinnati, O. The defendant was doing business in Rochester, N. Y. On May 8, 1918, the defendant wrote to the plaintiff asking for prices on eighty-proof whisky and on bond whisky. On May tenth the plaintiff telegraphed to the defendant as follows:

"CINCINNATI, OHIO, May 10, 1918.

"ANTONIO APRILE, 175 Jay St. cor. Kent, Rochester, N. Y.:

"Letter received. Best price on Eighty proof six aught five. Can furnish you also fine Kentucky Whiskies Spring Sixteen or Seventeen at Three Ten per gallon in Bond. Spring Thirteen or fourteen at Three Dollars. These prices good today only. Wire us our expense your order. Market will advance again within twenty-four hours and prices will be withdrawn unless we hear from you today

"Charges Paid. THE TURNER-LOOKER CO."

On the same day the defendant replied by telegram as follows:

"GENESEO, N. Y., May 10, 1918.

"THE TURNER-LOOKER Co., Cincinnati, O.:

"Telegram received. I will take ten Barrel Kentucky Whiskey Spring Thirteen at the price of Three Dollars in Bond per Gallon. ANTONIO APRILE."

On the next day the plaintiff wrote the defendant stating that it inclosed invoice covering ten barrels of spring thirteen Kentucky whisky at three dollars per gallon and stating that it would draw for the amount through the Lincoln National Bank. The defendant testified that he did not receive that letter. On the same day the plaintiff made a draft on the defendant for \$1,466.97, and attached to the draft a bill for 503.77 gallons of whisky at \$3 per gallon, amounting

to \$1,511.31, less \$44.34, the amount due the warehouse for storage and local taxes, leaving a balance of \$1,466.97, the amount of the draft. There were also attached certificates for ten barrels of Kentucky whisky, which certificates were properly indorsed. The certificates described the barrels so that they could be identified. The warehouse stamp number and the serial number of each barrel appeared on the certificates. The certificates were issued in accordance with the provisions of the United States Internal Revenue Law.

On May thirteenth the bank notified the defendant that it held the draft with warehouse receipts attached. The defendant returned the notice indorsed as follows: "Please return this draft back and oblige, A. Aprile." On May twenty-ninth the plaintiff wrote to the defendant demanding pay for the whisky, the defendant did not reply and this action was commenced.

The complaint alleges the agreement to purchase and sell ten barrels of whisky at \$3 a gallon in bond and states that the net amount agreed to be paid for said whisky was \$1,466.97. It alleges that the plaintiff, through the Lincoln National Bank, tendered to the defendant the warehouse receipts for said whisky upon the payment of said amount and that the defendant refused to accept said receipts and has since refused to accept said whisky and pay for the same; that the plaintiff holds said whisky for said defendant and is ready and willing to deliver the same upon the payment of the purchase price. The answer contains the following admission: "Admits that on or about May 16, 1918, said plaintiff and said defendant entered into an agreement whereby said plaintiff agreed to sell and said defendant agreed to purchase ten barrels of Kentucky whisky, Spring 1913 or 1914, at the agreed price of Three Dollars per gallon." The answer then alleges that the plaintiff has not complied with the terms of the agreement, that it has never delivered or offered to deliver said whisky to the defendant.

At the opening of the case the defendant moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, *first*, because there was no allegation as to delivery, and, *second*, that the complaint did not allege when the contract was to be performed. There is no force in the second ground as the law implies, in

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the absence of such a term, that delivery was to be made in a reasonable time. The other ground stated involves the question, to be hereafter discussed, as to whether or not the tender of the warehouse receipts constituted a tender of delivery or delivery of the whisky. The motion to dismiss the complaint was denied with an exception. At the close of the plaintiff's case a motion was made for a nonsuit, which was denied, and that motion was renewed at the close of all of the evidence at which time the plaintiff moved for a directed verdict. The defendant then asked to go to the jury upon one question only: "Whether, under all the proof here, there was a delivery of the goods in question under the custom prevailing in regard to the marketing of that particular sort of commodity. "

There can be no question but what the telegrams constituted a definite and certain offer and acceptance and, as a result, a contract was completed whereby the plaintiff agreed to sell to the defendant ten barrels of Kentucky whisky, spring thirteen, for three dollars a gallon, in bond. It is undisputed that at the time the plaintiff mailed to the Lincoln National Bank the draft, with the bill and the warehouse receipts, it owned the ten barrels of whisky described in the telegrams and that the same was in bond at New Haven, Ky., in the warehouse of J. N. Blakemore, Incorporated. The receipts in question were regularly issued by J. N. Blakemore, Incorporated. They described the brand of the whisky, the serial number on each barrel, the warehouse stamp number on each barrel, the number of gallons in each barrel, and the receipts had been duly registered on the books of the Equitable Trust Company of New York, and each bore the certificate of the trust company to that effect. They were properly indorsed so that, upon delivery, the defendant could have taken the receipts and identified the whisky. There was nothing more to be done by the plaintiff as vendor. The particular ten barrels had been segregated and identified, the evidence of the same had been forwarded to be delivered to the defendant upon the payment of the price. There was nothing that remained to be done by the defendant, except to pay the purchase price agreed upon. Under such circumstances, the tender of the bonded warehouse receipts constituted a valid

tender of delivery of the ten barrels of whisky in question, and the tender of performance, by the tender of delivery of the warehouse receipts, was equivalent to an actual delivery or a tender of physical delivery of the whisky in question. (*Wilkes v. Ferris*, 5 Johns. 335; *Mackie v. Egan*, 6 Misc. Rep. 95; *Dunham v. Pettee*, 8 N. Y. 508; *Hankins v. Baker*, 46 id. 666; *Hayden v. Demets*, 53 id. 426; *Salmon v. Brandmeier*, 104 App. Div. 66; *Horst v. Montauk Brewing Co.*, 118 id. 300; *Miller v. Ungerer & Co.*, No. 1, 188 id. 659; *Kessler & Co. v. Veio*, 142 Mich. 471; 30 Am. & Eng. Ency. of Law [2d ed.], 71.) There was a binding, legal contract and a legal delivery, or a constructive delivery, under that contract, and upon the failure of the defendant to pay for the goods and to take them, the plaintiff was entitled to recover in an action against the defendant for the breach of the contract.

It is urged by the defendant, however, that the trial court adopted an illegal measure of damages. It is doubtful if that question is here, as the only question which the defendant asked to go to the jury upon was whether or not there was a delivery of the goods in question. However, I am satisfied that the court adopted the correct measure of damages.

Section 144 of the Personal Property Law (as added by Laws of 1911, chap. 571) contains the following provisions:

"§ 144. Action for the price. 1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

"2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

"3. Although the property in the goods has not passed,

if they cannot readily be resold for a reasonable price, and if the provisions of section one hundred and forty-five are not applicable, the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

The plaintiff in this case elected to bring his action for the purchase price of goods sold and delivered on the theory that the title had passed. Prior to the enactment of said Personal Property Law it was undoubtedly the common-law rule in this State that the vendor, at his election, in all cases where the title to the property had passed, could sue and recover the contract price even though he retained the actual, physical possession of the property, in which case he held the goods as trustee for the buyer. (*Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 id. 595; *Ackerman v. Rubens*, 167 id. 405; *Phelps-Stokes Estates v. Nixon*, 222 id. 93; *Bogert Sale of Goods in New York*, 243.)

In *Hayden v. Demets* (*supra*) the court said: "Upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passes to the vendee, at whose risk it is retained by the vendor. The same consequence as to title results from a valid tender, upon an executory contract. Upon the refusal of the vendee to accept and pay the price, the vendor, upon proper notice, may sell the property and recover the difference, or he may sue for the difference between the contract and actual price, in which case he elects to retain the property as his own, or he may recover the contract price, in which case he holds the property as trustee for the vendee, and is bound to deliver it, whenever demanded, upon receiving payment of the price. In selling the property after tender and refusal, the vendor acts as the agent and trustee of the vendee, to whom the title is deemed to have passed by the tender. The right of the vendor to recover the price of the goods, if he chooses to risk the solvency of the vendee, necessarily results."

It seems to be clear that where the title has passed, the vendor may now, under subdivision 1 of section 144, sue and

recover the purchase price as at common law, even though the vendee has refused to accept the goods and to pay the purchase price. (*American Aniline Products, Inc., v. Nagase & Co., Ltd.*, 187 App. Div. 555; *Miller v. Ungerer & Co., No. 1*, 188 id. 655; *Ferry v. South Shore Growers & Shippers Assn.*, 189 id. 542; *Phelps-Stokes Estates v. Nixon*, *supra*.)

It is undoubtedly true that subdivision 3 of section 144 of the Personal Property Law changed the New York rule which permitted a recovery of the purchase price in an action for goods sold and delivered in certain cases where the title had not passed. The case of *Ideal Cash Register Co. v. Zunino* (39 Misc. Rep. 313) and the cases there cited, illustrate the kind of cases which have been affected by subdivision 3, and it has been held that in cases falling under subdivision 3, where the title has not passed, the vendor cannot maintain an action for the purchase price unless the case is one of those referred to in said subdivision, that is, that the property in question cannot readily be resold for a reasonable price and the seller has offered to deliver the goods to the buyer who has refused to receive them, and the seller has notified the buyer that he holds the goods as bailee for the buyer. There are certain expressions in some opinions which, standing alone, would indicate that an action could not be maintained for the purchase price under subdivision 1 unless the purchaser had actually received and taken possession of the goods. It will be found, however, upon an examination of those cases, that the court held in each instance that the title had not passed from the vendor and therefore, subdivision 1 was not applicable. (*Mosler Safe Co. v. Brenner*, 100 Misc. Rep. 107; *Crown Electric Illuminating Co., Inc., v. Chiariello*, 106 id. 511; *Prager v. Scheff & Co., Inc., No. 1*, 107 id. 500; *Harbison v. Propper*, 112 id. 588.)

Bogert in his work on the Sale of Goods in New York (at p. 246) in a note to section 144, says: "The New York rule upon this subject has been greatly modified by the Sales Act. Now only in cases where the goods 'cannot readily be resold for a reasonable price' may the seller force the title on the buyer and recover the price of him. Formerly he could recover the price in all cases after due tender."

This statement, standing alone, would be confusing, but it

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is to be noted that the statement is contained in note No. 3, commencing at page 245. The headline of that note is as follows: "Action for price when title has not passed." The author undoubtedly had in mind that under the common law in this State the vendor could, in certain cases, recover in an action for goods sold and delivered, the purchase price even where the title had not passed, and it was that rule of law which he meant to say had been changed by the statute in question, as is illustrated by the cases last above cited.

I do not think that there was any error in directing a verdict for the plaintiff. There is no sufficient evidence in the record to make a question of fact upon the question of custom upon the sale of whisky in bond. I think the court ought to take judicial cognizance of the fact that the sale of whisky in bond means a sale of whisky in a United States government bonded warehouse, as described in the Internal Revenue Law, and that the term is so clear, definite and certain that it is not subject to change by evidence of custom, but aside from that, the evidence in this case falls far short of the standard required by the law in attempts to vary the meaning and words of a contract by evidence as to custom and is contradictory to the provisions of the Federal statute governing the storage of whisky in bond. (U. S. R. S. § 3271; U. S. Comp. Stat. 1916, § 6009; 4 Fed. Stat. Ann. [2d ed.] p. 37, § 3271.) It is apparent that the defendant knew the difference between the purchase of whisky in bond, and the purchase of other whisky, because in his letter he makes the distinction between eighty-proof whisky and whisky in bond, and in the telegram of the plaintiff to the defendant the same distinction is made, for the price of eighty-proof whisky was quoted at six dollars and five cents, while whisky in bond was quoted at three dollars, though the whisky in bond was higher proof, higher quality and more expensive whisky than eighty-proof whisky, which was so low in quality that it could not be kept in bond. It must have been clear to the defendant that on the eighty-proof whisky the tax was added to the selling price, while on the whisky in bond the tax was not added but the whisky was sold in bond subject to the government tax. It seems to me that, under such circumstances, evidence of custom given in this case was not sufficient to make a question of fact for the jury.

It is urged by the appellant that, as the evidence discloses that prior to the trial the plaintiff sold the whisky in question and was not in a position, therefore, to hold it as agent or trustee for the defendant, to be delivered to him upon the payment of the judgment, a recovery should not be permitted for the purchase price. No such question was suggested by the pleadings. The complaint alleged that the plaintiff held such whisky for the defendant. At the time of the commencement of the action that was true but the cross-examination of the vice-president of the plaintiff disclosed the fact that about eight months after the commencement of the action the plaintiff sold the whisky for ninety-five cents a gallon. The defendant did not ask to amend his answer and the case was properly disposed of on the pleadings. The plaintiff had elected to bring its action for the purchase price and fixed the title of the whisky in the defendant, and it may be that when it sold the whisky for ninety-five cents a gallon it was selling the defendant's whisky without authority and would be liable to the defendant for all damage caused to him thereby, but that question was not pleaded or litigated. Possibly the defendant was unwise in refusing to accept the offer of the plaintiff to permit him to amend the answer and set up his damages. Having failed to do it, however, he cannot raise the objection now. The cases seem to be conclusive upon this question. (*Schepp Co. v. Far Eastern Mfg. Co.*, 168 N. Y. Supp. 636; *Stokes v. Mackay*, 147 N. Y. 223.)

While the result in this case may seem to be a hardship upon the defendant it is brought about by his own conduct and not by the law. I see no way to relieve him from the penalty that he incurred in violating his contract and I advise that the defendant's exceptions be overruled and a new trial denied and judgment directed for the plaintiff upon the verdict, with costs.

All concur, except KRUSE, P. J., and CLARK, J., who dissent in a memorandum by KRUSE, P. J.

KRUSE, P. J. (dissenting):

The serious question is whether the tender of the warehouse receipt for whisky in a bonded warehouse in the State of Kentucky passed the title to the defendant against his will. If the contract had been for the specific whisky covered by

the warehouse receipt the place of delivery would be at the warehouse where the whisky was in bond, in the absence of any contract to the contrary. (Pers. Prop. Law, § 124, as added by Laws of 1911, chap. 571.) But it was not. In such a case, in the absence of any agreement or usage of trade to the contrary, the place of delivery was at the plaintiff's place of business at Cincinnati. (Pers. Prop. Law, § 124.)

While the testimony of the plaintiff of trade usage is not very clear, it is in harmony with the rule just referred to and sufficient, in connection with the other circumstances, as it seems to me, to sustain a finding that it was the intention of the parties that the plaintiff should take the whisky out of bond wherever it might obtain the same, deliver it to a carrier at Cincinnati consigned to the defendant, and draw on him for the amount of the purchase price and Federal tax, attaching the draft to the bill of lading, as the defendant contends. Otherwise the defendant might have to pay the transportation charges from any place where whisky of this description might be stored in bond.

Furthermore, the plaintiff, instead of keeping the whisky on hand for the defendant, has disposed of it. While perhaps this may not of itself bar a recovery for the purchase price since such disposition was after tender and commencement of the action (*Stokes v. Mackay*, 147 N. Y. 223, 236), it would seem to be at least a circumstance in support of the defendant's contention. Selling the whisky to others, as plaintiff did, is entirely inconsistent with its claim that the title passed to the defendant and became his property.

While the complaint alleges that the plaintiff holds the whisky for the defendant and is ready and willing to deliver the same, this allegation is denied in the answer, and the undisputed proof is to the contrary and was received without objection.

I think the direction of the verdict was erroneous and a new trial should be granted.

CLARK, J., concurs.

Defendant's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the plaintiff upon the verdict, with costs.

VILLAGE OF WARSAW, Respondent, *v.* PAVILION NATURAL GAS COMPANY, Appellant.

Fourth Department, March 16, 1921.

Gas and electricity — rates — gas company cannot raise rates above franchise maximum by filing schedules and publishing under Public Service Commissions Law, section 66, subdivision 12 — procedure to change rates under Public Service Commissions Law, section 71, where maximum fixed by contract or franchise.

A gas company cannot legally increase its rate above the maximum provided by its franchise or contract with a municipality by filing a schedule of increased rates and publishing for thirty days under the provisions of subdivision 12 of section 66 of the Public Service Commissions Law; that can be done only where there is no prohibitory contract or franchise rate.

Where a gas company deems the maximum rate fixed by contract or franchise to be unjust and unreasonable, due to a change in conditions from the time when the rate was agreed on, it must proceed under section 71 of the Public Service Commissions Law by making a complaint to the Commission, and after a hearing the Commission may abrogate the contract rate and give the company the rate to which it may be entitled, not exceeding a rate fixed by statute.

APPEAL by the defendant, Pavilion Natural Gas Company, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Wyoming on the 1st day of June, 1920, granting plaintiff's motion for an injunction *pendente lite*.

James M. E. O'Grady, for the appellant.

Clarenc H. Greff [*Arthur E. Sutherland* of counsel], for the respondent.

DAVIS, J.:

The appellant, a domestic gas corporation, on April 14, 1909, obtained from the village of Warsaw, a municipal corporation, a franchise whereby it was permitted to lay its mains and pipes in the streets, agreeing on its part that it would furnish a supply of gas to its customers in said village, including the municipality itself, at a maximum rate of forty

cents per 1,000 feet for the individual customers, and twenty cents per 1,000 feet to the municipality for lighting certain buildings. The term of this agreement was fifty years.

The corporation thereafter laid its mains, established and charged the franchise rates to the municipality and its citizens, filing and publishing schedules thereof as the law and the orders of the Public Service Commission required.

It is now claimed by the corporation that owing to changed conditions these rates have become unprofitable. It says that it does not receive sufficient revenue from the sale of its gas to pay operating expenses. Therefore, on August 8, 1919, it filed a petition with the Public Service Commission of the Second District for leave to increase its rate to individual customers to seventy-five cents per 1,000. The village appeared and filed objections, and a proceeding was conducted by the Commission to determine whether or not such increase should be permitted.

While this proceeding was pending the corporation on February 7, 1920, filed a schedule with the Commission fixing the rate for the individual consumers at eighty-five cents per 1,000 feet. This rate was to become effective March tenth, and would be collected the following month. When bills were received by customers in April they were charged the new rate, and their bills contained a notice that the gas would be shut off if the rate was not paid. Thereupon, the village brought this action and obtained a temporary injunction restraining the corporation from enforcing the rate and shutting off the gas. From the order granted at Special Term this appeal was taken.

The question fairly presented here is, did the appellant have the right, sanctioned by legislative act, to file such schedule of increased rates, and thereby abrogate the franchise rate and establish a higher one without notice to the village and without action thereon by the Public Service Commission?

The right to increase such rate is claimed under the provisions of section 66, subdivision 12, of the Public Service Commissions Law. That section grants to the Public Service Commission supervision over gas and electrical corporations, with power, among other things, to require them to file, print and to keep open to public inspection schedules of rates and

charges made. The purpose of this portion of the law is evidently that the public may have notice of what consumers will be required to pay, and that it may be known that there will be no discrimination between consumers of the same class.

The corporations are, by a further provision, forbidden to change the rate, charge or service so filed, "except after thirty days' notice to the Commission and publication for thirty days as required by order of the Commission, which shall plainly state the changes proposed to be made in the schedules then in force and the time when the change will go into effect." The purpose of this portion of the law also is plain. It is intended to prevent the giving of special rates to favored customers and the exaction of unjust and unreasonable rates from the public generally; for if the schedule of rates is filed and published thirty days before the rates become effective, any municipality or a sufficient number of individuals interested, or the Commission on its own motion, may take action to prevent such discriminatory or unreasonable rates from going into effect. (See Public Service Commissions Law, § 66, subd. 5; *Id.* §§ 71, 72.) Pending the proceedings herein subdivision 12 of section 66 and section 72 were amended by chapter 542 of the Laws of 1920, but that amendment does not affect this case.

It was under this latter provision of subdivision 12 of section 66 that the corporation acted in seeking to establish the increased rate now in question, and it says that it took this action to change its rate, relying upon the decision of this court, where a similar increase in a rate was upheld, in *Public Service Commission v. Iroquois Natural Gas Co.* (184 App. Div. 285; *affd.*, 226 N. Y. 580). That case is not an authority for the appellant's position here. The facts in that case, not fully disclosed in the opinion, were that the gas company had not attempted to file a rate in excess of a pre-existing franchise rate; and the gas corporation had entered into a certain stipulation, the legal effect of which the Commission and the city contended would prevent the filing and collection of a new rate by the gas company. We held that this stipulation did not apply to the method adopted by the corporation in increasing the rate, and in the absence of

a franchise rate the company could establish a legal rate for its consumers by filing a new schedule as provided by section 66, subdivision 12, of the Public Service Commissions Law.

We hold the same doctrine now. There are two methods provided by that statute by which a gas corporation may increase its rate: *First*, where there is no prohibitory contract or franchise rate, by filing a new schedule of rates as authorized by section 66, subdivision 12, and the rules and regulations of the Commission, and unless this rate is declared invalid by an order of the Commission after hearing, it will stand as the legal rate; *second*, where a maximum rate fixed by contract or franchise exists, which the corporation deems unjust and unreasonable due to a change of conditions from the time when the rate was agreed upon, the corporation may make complaint to the Commission under the provisions of section 71, and when notice is given to those affected thereby and after a hearing and investigation by the Commission, as provided in section 72, the Commission may abrogate the contract rate by its order, giving the corporation the rate to which it may be entitled, not exceeding a rate fixed by statute.

A gas corporation, when duly permitted to do business in this State, may elect originally whether it will do business without special contracts under an established schedule of rates, reserving the right given by law to make changes therein as the conditions demand; or whether it will make contracts for a resale of its product, or an agreement by franchise to sell to a municipality and its citizens at a fixed rate, receiving as a consideration privileges granted it by the municipality. If it chooses the latter course and the rates fixed are not discriminatory, it has bound itself as firmly as individuals can bind themselves in making contracts, with this exception, the State itself may relieve either party to the contract from the obligation to pay or to receive a fixed rate, if the rate is unjust and unreasonable.

This control by the State over contracts of this nature exists by virtue of its reserved police power. The State through the Legislature may regulate rates and the means of service of public utilities and intervene in contracts for furnishing transportation, light, heat, power or other public service. It may say whether the contract rate is unjust or unreasonable,

and modify or adjust the terms of the contract in the public interest. The exercise of this power is an act of sovereignty and very largely this power by statute has been delegated to the Public Service Commissions. Such legislation does not violate the constitutional inhibition (U. S. Const. art. 1, § 10, subd. 1), that the obligation of contracts may not be impaired, for contracts of this nature are made ordinarily in contemplation that the State possesses the power to regulate rates and may at any time exercise it. These principles are so well known and established that it is no longer necessary to cite authority. But the State has not delegated and could not delegate to a private person or to a public service corporation the right to declare invalid or to modify contracts because they were unprofitable, or for any other reason. In regulating the method by which a gas corporation may change its rate to its customers when it is not restricted by any contract or franchise, the State does not thereby impart to the corporation its own police power.

The gas corporation may not legally assume to be vested with the rate-making power and to be the arbiter of the adequacy and reasonableness of its rates. It may not assume power to decide these questions in its own favor and proceed to abrogate the contract whose benefit it has long enjoyed. It may not, of its own motion, say that it will no longer be bound by a contract because it has become unprofitable. The courts even will not relieve parties from hard bargains simply because they are such. (*Columbus Railway & Power Co. v. Columbus*, 249 U. S. 399.)

The gas corporation has the same right to ask modification of the contract in the public interest that the municipality would have, if the physical property and apparatus used by the corporation became insufficient or dangerous to health, or if the rates in the course of time became exorbitant and unreasonable — the right to appeal to the sovereign State or to its delegated agent having dominion over such matters. The corporation has no greater right than the municipality to determine for itself the merits of such a disputed question. (See opinion of CRANE, J., in *People ex rel. Village of South Glens Falls v. Public Service Commission*, 225 N. Y. 216, 222.)

The question we have been called upon to decide has already

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been determined in the Second Department and we agree in the conclusions reached by KELLY, J., in *Town of North Hempstead v. Public Service Corporation* (193 App. Div. 224). The same conclusion has been arrived at in several cases at Special Term. (See *Village of Mt. Morris v. Pavilion Natural Gas Co.*, 183 N. Y. Supp. 792; *Village of Warsaw v. Pavilion Natural Gas Co.*, 184 id. 327, 329; *Village of Freeport v. Nassau & Suffolk Lighting Co.*, 111 Misc. Rep. 671.)

For the reasons stated the order appealed from must be affirmed, with costs.

All concur.

Order affirmed, with ten dollars costs and disbursements.

LOUIS GOLD, Respondent, v. LOUIS ROSS, Appellant.

Second Department, March 4, 1921.

Evidence — contracts — action on promissory note — defense — agreement by plaintiff with third person to execute release to defendant — parol evidence not admissible to explain meaning of "as individuals" in agreement — agreement to execute release though not signed by defendant was good defense to action on note.

The parties herein organized a speculative corporation which never obtained any actual business and the expenses of which were borne by the plaintiff. Subsequently they organized another speculative corporation which had the same office and the same employees as the first and the expenses of which were borne by the plaintiff. Thereafter a division of expenses was made and the defendant gave to the plaintiff his note for one-half thereof which is the basis of the present action. Thereafter a third person came into the second corporation agreeing to make certain advances upon the guaranty of the defendant and other stockholders. The plaintiff subsequently sold his interest to said third person for a stipulated sum under a contract which provided among other things that "Mutual releases are to be exchanged between said Louis Gold [plaintiff] and * * * Louis Ross [defendant] * * * as individuals, and as stockholders and directors of the North River Ship & Engine Corp. [second corporation] and as co-guarantors to Lester Cohn [said third person] under the contract heretofore mentioned dated May 9th, 1919." Said release was never executed, but the defendant interposed the agree-

ment to execute the release as a defense in this action though he did not sign said agreement.

Held, that the transactions concerning the two corporations and individual and corporate payments were united and intermingled and the adjustment made at the time of the sale of plaintiff's interests to said third person comprehended the whole subject-matter.

It was error to permit parol evidence to be introduced of prior conversations for the purpose of explaining the meaning of the words "as individuals" in said agreement for release, for said expression was not ambiguous.

Though defendant did not sign said agreement for the release he was named as one of the parties to whom individual releases should be delivered and, on all the evidence, he is entitled to the equitable relief set up in his amended answer, and said agreement to release constitutes a defense to this action.

RICH and KELLY, JJ., dissent, with opinion.

APPEAL by the defendant, Louis Ross, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 27th day of February, 1920, on the decision of the court rendered after a trial at the Kings Special Term.

The action was for the amount of a promissory note for \$1,773.10, dated December 3, 1918, also for recovery of \$100, lent defendant on May 1, 1919. The amended answer, among other defenses, set up a release made in connection with the purchase of plaintiff's stock in the North River Ship and Engine Corporation, by one Lester Cohn, whereby Cohn was to pay plaintiff \$17,000, and for which plaintiff, besides assigning his stock, agreed also on the exchange of mutual releases, between him and defendant, with others, as individuals, and as stockholders and directors of the North River Ship and Engine Corporation, and as coguarantors to Lester Cohn, under a prior contract.

Henry Greenberg, for the appellant.

Herman S. Bachrach, for the respondent.

PUTNAM, J. :

The main question here is the relation between two corporations, in which plaintiff and defendant were interested. Both of them were speculative enterprises. The first was the Gold-Ross Company, which never obtained any actual business. It had been intended as a building corporation.

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Plaintiff alone bore its expenses, being rent of an office in the Woolworth Building, New York city, also advances for salaries, stationery and like outlays. Having so far been unsuccessful, plaintiff and defendant were attracted by the prospects of the business of shipbuilding and ship repairing. So in July or August, 1918, they incorporated another speculative company, called the North River Ship and Engine Corporation. Its office was in the same room in the Woolworth Building where the Gold-Ross Company had been, and it had the same employees. It had no financial basis beyond advances by plaintiff, who continued to pay its expenses and salaries. Neither company then kept books of account. In December, 1918, when these outlays for both companies were about \$3,500, there was a division evidenced by defendant's note for \$1,773.10 as his half of the expenses that plaintiff had advanced. This is the note set up in the first cause of action.

About May 9, 1919, Mr. Cohn came into the concern, agreeing to put in \$30,000, upon the guaranties of defendant and other stockholders. Afterwards, on July 31, 1919, plaintiff, whose total advances had been \$15,000, sold out to Cohn all his interest for \$17,000 cash, with the provision for the exchange of releases, as set up in the answer. This summary sufficiently shows how united and intermingled had been individual and corporate payments.

On this testimony we cannot find that these two speculative ventures had been wholly disconnected. Certainly a large part of this note represented office expenses and other overhead charges of the North River Ship and Engine Corporation, the control of which Mr. Cohn purchased.

In such a mixed-up affair it would have been a reproach to business men not to make this adjustment comprehend this whole subject-matter. Evidently they so intended by this provision: "Mutual releases are to be exchanged between said Louis Gold and * * * Louis Ross, * * * as *individuals*, and as stockholders and directors of the North River Ship & Engine Corp. and as co-guarantors to Lester Cohn under the contract heretofore mentioned dated May 9th, 1919."

Under the fallacious claim that the words "as individuals" are ambiguous, parol evidence was let in of prior conversations

— all of which had been merged in the contract. There is nothing double or dubious in the expression “as individuals.” It is no more, but decidedly less, ambiguous than the term “incompatibility” in *Gray v. Shepard* (147 N. Y. 177).

Respondent would justify this ruling by three decisions, two of which (*Grannis v. Stevens*, 216 N. Y. 583, and *Higgins v. Ridgway*, 153 id. 130) merely sanction the settled rule, that proof may be given that a note or contract had been conditionally delivered.

The third case (*Sabin v. Kendrick*, 58 App. Div. 108) recognizes that conversations *after* a contract may explain how the parties regard or interpret its terms. The ruling here was clearly against *House v. Walch* (144 N. Y. 418) and *Lossing v. Cushman* (195 id. 386). Its effect was not to clear up or remove an ambiguity, but rather “to import into the contract something that the parties did not put there,” and actually to nullify what they did put there. Going beyond explaining any obscure technical term, or other ambiguity, this improper testimony varies and contradicts plain and simple words chosen by the parties. (*Murdock v. Gould*, 193 N. Y. 369, 377.) Thus FOLGER, J., said: “An individual is one entity, one distinct being, a single one, and when spoken of the human kind means one man or one woman.” (*People v. Doty*, 80 N. Y. 225, 228.)

The fact that this defendant had not signed this agreement, which was one between plaintiff and Cohn, did not change the rule. Defendant was named as one of the parties to whom individual releases should be delivered, and the evidence, in my view, justified the equitable relief set up in the amended answer, which required judgment for this defendant.

I advise, therefore, that the judgment and the findings of fact numbered 4th, 6th, 7th, 8th, 9th, 10th, 11th, 13th and 14th be reversed, and complaint dismissed, with costs to appellant.

JENKS, P. J., and MILLS, J., concur; RICH, J., reads for affirmance, with whom KELLY, J., concurs.

RICH, J. (dissenting):

I dissent. Plaintiff advanced moneys to the Gold-Ross Company from time to time upon the understanding and agreement

with defendant that the latter should pay to plaintiff one-half of the moneys advanced. The corporation was unsuccessful. It had no business, and on the 3d day of December, 1918, there was due and owing to plaintiff from defendant on account of his advances \$1,773.10, for which defendant executed and delivered to plaintiff the note in suit. In addition to this note, plaintiff loaned to defendant on the 1st day of May, 1919, \$100.

In July, 1918, these parties organized another corporation known as the North River Ship and Engine Corporation.

This company, like the former, was organized for speculative purposes, but there was no connection between the two corporations. Plaintiff likewise advanced money to the Ship and Engine Corporation for rent, office expenses and salaries. In May, 1919, one Cohn undertook to finance the North River Company, upon the parties to this action together with the other stockholders of the company guaranteeing the repayment to him of the moneys advanced. This contract contained a statement of the obligations of the company at the time, which included the amount of plaintiff's advances to it as \$5,000.

The contract also contained among its provisions the following: "It is further agreed that Mr. Louis Gold is to be released from all obligations from the contract of May 9th, 1919, heretofore mentioned. Mutual releases are to be exchanged between said Louis Gold and Lester Cohn, Louis Ross, Charles W. Held and John Hartley, as individuals, and as stockholders and directors of the North River Ship & Engine Corp. and as co-guarantors to Lester Cohn under the contract heretofore mentioned dated May 9th, 1919." Upon the trial plaintiff was permitted to give evidence tending to show that at the time of the purchase of defendant's interest in the North River Ship and Engine Corporation, and the execution of the contract in evidence, there was no mention made of the individual liability of the defendant to plaintiff growing out of the advancements to the first company, on the theory that the contract was ambiguous and that oral evidence was admissible.

The object of the agreement which was executed in connection with the sale of the North River Ship and Engine Cor-

poration was to release the parties from the contract made with Cohn at the time of his entrance into the company, and it so recites. It was a part of the transaction for the purchase of the stock of the company. It seems to me perfectly clear that only claims arising out of the transactions in connection with the Ship and Engine Corporation were intended to be covered. It was established that the claim in suit arose out of an entirely different transaction. The evidence in question did not vary the terms of the instrument. It merely explained to what those terms were intended to apply and as to what was actually the subject-matter of the agreement. The word "individuals" is qualified by the succeeding words "and as stockholders," etc., and justifies the admission of the evidence in question. The object of the agreement was to settle the affairs of the parties with the Ship and Engine Corporation, and under the circumstances the word "individuals" introduced an ambiguity which it was proper to explain by parol evidence.

I must, therefore, vote for affirmance, with costs.

KELLY, J., concurs.

Judgment reversed, and findings of fact numbered 4th, 6th, 7th, 8th, 9th, 10th, 11th, 13th and 14th reversed, and complaint dismissed, with costs to appellant. Settle order on notice.

HARRIET J. McCOUN, Appellant, v. AMY K. PIERPONT and
NELLIE CRANZ, Respondents.

Second Department, March 11, 1921.

Taxation — improper listing of property on tax roll — failure to use ditto marks to connect property and ownership — reference to map — tax sale — insufficient notice of — relief in equity on partition — refund under Tax Law, section 156.

Where an assessment roll omitted from its first column ditto marks, referring to the name and subdivision of property, but correctly used them in the column for owners, such imperfect entry did not warrant the county

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treasurer in executing a tax deed which described certain lots as on "Map No. 1," it appearing that the top of the page of the assessment roll referred to "Map No. . . . 1907," that there was no map with that number, and that the only map of any kind was filed in 1911.

Where the description of the map is impressed only at the head of the first column of the assessment roll, ditto marks are necessary to connect the numbers of the lots with some means of definite description.

A tax sale notice is defective, insufficient and void which mentions no map and gives no description by which the property can be identified.

In a suit for partition of property bought at a tax sale, void because of false and misleading descriptions in the assessment roll, equity cannot give relief.

Under section 156 of the Tax Law a refund may be claimed of what was paid for deeds on a void tax sale; but the owner should not be required to lose the property because of defects in method of assessment.

REARGUMENT of an appeal by the plaintiff, Harriet J. McCoun, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Nassau on the 8th day of April, 1920, on the decision of the court rendered after a trial at the Nassau Special Term dismissing the complaint and adjudging the defendant Nellie Cranz as the rightful owner of three adjoining vacant lots at Long Beach, Nassau county. [See 194 App. Div. 912.]

These lots are numbered 65, 66 and 67, in block 126, on a map No. 1 Estates of Long Beach, filed in Nassau county April 20, 1911, as No. 31.

On November 29, 1913, the Estates of Long Beach conveyed these lots to the respondent Nellie Cranz in fee simple with full covenants, but subject to an easement and to certain building restrictions for the sum of \$2,775, duly paid by her, which is agreed to be the fair value thereof.

By and under tax sales purporting to be for unpaid taxes of 1913-1914, one Lydia E. Underhill received and caused to be recorded tax deeds for these three lots from the county treasurer of Nassau county. Afterwards she conveyed her interest therein to this plaintiff, who on April 16, 1919, conveyed an undivided one-fiftieth part of these lots to defendant Amy K. Pierpont. On May 28, 1919, this action for partition was begun, in which Nellie Cranz, as a counterclaim, asked relief that her title be sustained, and that the tax deeds relied on by plaintiff be canceled.

The court found and decided that the lots were not properly described in the assessment roll for the year 1913, and the attempted descriptions in the advertisements of tax sales were not reasonably sufficient to identify the same. From this judgment the plaintiff took this appeal.

William T. McCoun, for the appellant.

J. Boyce Smith, Jr., for the respondent *Nellie Cranz*.

H. Stewart McKnight [*James K. Foster* with him on the brief], for the treasurer of Nassau county.

PUTNAM, J.:

The record contains a photographic copy of page 282 of this assessment roll for the year 1913. These three lots on the 15th, 16th and 17th lines, are near the foot of the page. The first column, entitled "Name of subdivision," has written in "Estates of Long Beach, Long Beach, L. I. William H. Reynolds, President. Map No. . . . 1907, Chas. W. Leavitt, Landscape Eng. 220 Broadway, N. Y. City. Filed in County Clerk's office Nassau Co. N. Y. Apr. 20, 1911." The short lines of this heading fill the space opposite lots 51-54. Beneath are no ditto marks, but each of the lots here in question, after the column giving numbers, has under head "Total amount of tax" the figures 3.68. Under the title "Reputed owner and address" and opposite lot 65 are the words "Estates of Long Beach," with ditto marks beneath, opposite lots 66 and 67. There is no map with the number 1907. The only map of any kind was filed in 1911.

Ditto marks are omitted from this first column, referring to name and subdivision, although correctly used in the last column for owners. Did this attempted and imperfect entry warrant the county treasurer's tax deed in describing these lots as on "[Map No. 1," where the top of the page of the assessment roll only referred to "Map No. . . . 1907?" Appellant points out that there was then no other map of Long Beach property filed with the county clerk, so that from such extrinsic evidence it would supply the omission of an identifying map number.

In *Fulton v. Krull* (200 N. Y. 105, 110), HISCOCK, J., said: "We of course agree with the appellant that the description employed in the assessment roll cannot be helped out by additional details of description incorporated into the deed. We also hold that no reference having been made in the roll to the map which had been filed in the clerk's office, resort cannot be had to that for the purposes of description and identification of the lands attempted to be assessed."

It further appears that in entering on the roll mapped lots in Nassau county they have the slack habit of impressing the description of the map only at the head of the first column, with the lines beneath left entirely blank and without ditto marks. Such marks, however, are essential to show an inquirer that the particulars in the lines above are repeated below. (*Hodgdon v. Burleigh*, 4 Fed. Rep. 111.)

The loose and slipshod method of entering lots without ditto marks has been pronounced insufficient in *People ex rel. National Park Bank v. Metz* (141 App. Div. 600, 606). That related to the column headed "Description of Property and Supposed Owner." Mr. Justice LAUGHLIN said: "It is contended by counsel for the respondents that the word 'Unionport' in the column headed 'Description of Property and Supposed Owner,' relates to all of the assessments on the page and, by a reference to a preceding page of the assessment roll, shows that it had reference to a map of Unionport, which was a village in the county of Westchester. This was not, I think, a compliance with the statutory requirements." Although this case was criticised on another point in *People ex rel. Staples v. Sohmer* (206 N. Y. 39, 43), this ruling has not been doubted or disturbed.

In the first column of this roll ditto marks are necessary to connect the numbers with some means of definite description. Without them there is conjecture and uncertainty as to what the numbered parcels may be. Such marks are even more essential than merely to show ownership. (*Lalor v. Mayor, etc., of New York*, 12 Daly, 235.) The strictness with which the law guards tax assessments holds void a tax record which had only figures, with no words or dollar mark to indicate the sum assessed and to be collected. (*Norris v. Hall*, 124 Mich. 170.) The care to protect the owner's rights also is illustrated

in *Harrington Co. v. Horster* (89 N. J. Eq. 270). (See, also, the decisions grouped by Mr. Justice YOUNG in *McInnis v. City of New Rochelle*, 99 Misc. Rep. 388.)

The learned court also found that the tax sale notices of these lands were defective, insufficient and void. At the bottom of the fifth column of page 16 of the tax sale notice published in the *North Hempstead Record* appears the following:

“ Block 126.

Est. of Long Beach, lots 1, 2, 3, years 1913, 1914, each.....	15.67
Est. of Long Beach, lots 11 to 32, years 1913, 1914, each.....	10.29
Gertrude I. Bleekman, lot 46, years 1913, 1914...	11.88
Gertrude I. Bleekman, lots 47, 48, years 1913, 1914, each.....	11.63
Est. of Long Beach, lots 65 to 67, year 1913, each..	5.97”

This fifth column mentioned no map. But earlier on the page towards the foot of the *second* column, in same small type, is this: “ Map No. 1, of property known as Estates of Long Beach, at Long Beach, made by Chas. W. Leavitt, Jr., March, 1907. Filed in County Clerk’s Office, April 20, 1911. District 28.”

Under and following this entry the block numbers run and vary with irregularity. First is a series from 6 to 52; then from 139 to 206; then is interpolated block 5, after which are blocks 42 up to 146, in which last series is found block 126. Hence the finding that reference to the map (without which lot numbers are useless and nugatory) is not reasonably connected with such lot entries. This difficulty is made greater by omitting to use any distinguishing type for such map reference. However, had the lots been originally clearly shown upon the assessment roll this bad and confused arrangement in the notice might not be fatal. If any advertising usage was here followed, then such usage should be corrected.

In this equity suit for partition, I see no ground for helping out such tax sales based on false and misleading descriptions in assessment rolls. As was said by Judge O’BRIEN in *Sanders v. Downs* (141 N. Y. 422, 426): “Any construction of the

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statute which would in any degree encourage erroneous, lax or careless methods of making up the assessment roll, would disturb the security with which the law guards private rights, and at the same time prove detrimental to public interests."

A refund may be claimed of what was paid for these tax deeds (Tax Law, § 156, as amd. by Laws of 1912, chap. 268), but the respondent should not lose her lots because of defects in taxation. I, therefore, advise that the judgment be affirmed, with costs.

Present — JENKS, P. J., MILLS, PUTNAM, BLACKMAR and KELLY, JJ.

Judgment unanimously affirmed on reargument, with costs.

EMILY S. RYDER, as Administratrix, etc., of WALTER S. RYDER,
Deceased, Respondent, v. JOHN FINDLAY, Appellant.

Second Department, March 18, 1921.

Negligence — passenger thrown from automobile — injury or treatment by physician as cause of death — when verdict set aside — errors of surgeon or nurse do not excuse original wrongdoer.

Where on the trial of an action for negligently causing the death of an automobile passenger injured in a collision, there is a dispute as to whether death was due to the injury or to the treatment of the attending physician, and the jury is, in effect, told that if the deceased "would not have died except for the negligence of the physician, then there can be no recovery here against the defendant," a verdict for the defendant is properly set aside.

An original wrongdoer, whose acts inflict injuries that may result in death, is not relieved by errors of a surgeon or nurse in treatment of the injury.

APPEAL by the defendant, John Findlay, from an order of the Supreme Court, made at the Westchester Trial Term and entered in the office of the clerk of the county of Westchester on the 10th day of May, 1920, setting aside the verdict in favor of the defendant and granting a new trial.

The action was for negligently causing the death of Walter

S. Ryder by a collision on September 4, 1917, of the automobile in which he was riding with another motor car, by which Ryder was thrown out and rendered unconscious, receiving fractures of the ribs. He was placed on a passing mail truck and taken to the United Hospital in Portchester, and there attended by a Harrison physician for about half an hour, who then went away. His treatment was the subject of some dispute. The following morning Ryder died. After the jury had been charged, and retired, they returned and asked respecting two negligent causes of death. If there were two causes of death, both efficient and concurring, the court said that plaintiff could still recover. "You must find, however, in that event, that this man would not have died had it not been for the negligence of Findlay; you have got to find that anyway in order to find for plaintiff here. Juror: Suppose we find that he would not have died except for the negligence of the physician? The Court: If he would not have died except for the negligence of the physician, then there can be no recovery here against the defendant."

The jury again retired, and then brought in a verdict for defendant, which the court set aside for misdirection.

Humphrey J. Lynch [*Alfred W. Andrews* with him on the brief], for the appellant.

Sydney A. Syme, for the respondent.

PUTNAM, J.:

We agree that the court's final answer here may have given an erroneous impression. After explaining concurring causes of death, an instruction was asked on the supposition that the jury found that Ryder "would not have died except for the negligence of the physician," which led to the statement that then there could be no recovery against defendant.

The rule is that an original wrongdoer, whose acts inflict injuries that might result in death, is not relieved by errors of a surgeon or nurse in treatment of the injury. (*Purcell v. Lauer*, 14 App. Div. 33, 38; *Lyons v. Erie Railway Co.*, 57 N. Y. 489; *Caven v. City of Troy*, 15 App. Div. 163.)

And this extends also to the criminal law. If a felonious assault is operative as a cause of death, the causal co-operation

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of erroneous surgical treatment does not relieve the assailant from liability for the homicide. (*People v. Kane*, 213 N. Y. 260.)

The order for a new trial should, therefore, be affirmed, with costs.

Present — MILLS, RICH, PUTNAM, BLACKMAR and JAY-COX, JJ.

Order unanimously affirmed, with costs.

In the Matter of the Application of MINNIE DOYLE for the Appointment of a Committee of the Person and Property of DANIEL O'CONNOR, Respondent, an Alleged Incompetent Person.

ANNIE LYNAM, as Committee, etc., of DANIEL O'CONNOR, etc., and MINNIE DOYLE, Appellants.

Second Department, March 18, 1921.

Incompetent persons — oath of commissioner in proceedings *de lunatico inquirendo* — when same may be filed *nunc pro tunc* — issuing precept to sheriff for jury before taking oath — venue of proceedings.

A commissioner appointed in proceedings *de lunatico inquirendo*, who, before filing his oath, issued a precept to the sheriff to summon a jury, but before any further proceedings were had, called in a notary and took the statutory oath, yet failed to file the same until after the hearings and the granting of the order declaring incompetency, should be allowed to file his oath *nunc pro tunc*, since such act is merely ministerial.

The fact that the precept was issued before the commissioner took the oath should not invalidate the proceedings, since this is also a ministerial act.

It seems, that the proceedings would not be void where the jury are regularly brought in even without a precept.

The jury may be summoned, the hearings had, and the oath filed in the county where the alleged incompetent resides, or where the land affected is located, although the petition may have been presented in another county within the judicial district.

APPEAL by Annie Lynam, as committee, etc., and another, from an order of the Supreme Court, made at the Kings Special

Term and entered in the office of the clerk of the county of Kings on the 22d day of December, 1920, denying a motion for an order to file an oath of a commissioner in a proceeding *de lunatico inquirendo*, as of the date it was taken.

Robert H. Elder, for the appellants.

Ernest M. Garbe, for the respondent.

BLACKMAR, J.:

The proceeding was begun by an order made in Kings county on the 8th of March, 1920, appointing Frank S. Gannon, Jr., commissioner. Gannon, before filing his oath, issued a precept to the sheriff of Richmond county to summon a jury. The case came on for hearing on the sixth of April. Before any proceedings were had on the hearing, Gannon called in a notary and took the statutory oath. It appears, however, that the oath was not filed until September twenty-fourth, after the hearings were ended. The committee, Annie Lynam, applied for permission to sell real property in Richmond county. She found a purchaser, and a contract was agreed upon, but objection to the title was taken because the commissioner had omitted to file his oath until after the hearings and the granting of the order declaring incompetency. In this situation the committee of the incompetent made a motion to be permitted to file the oath *nunc pro tunc*. The motion was denied on the authority of *Matter of Bischoff* (80 App. Div. 326).

The statute (Code Civ. Proc. § 2329) provides that each commissioner, before entering upon the execution of his duties, must subscribe and take, and file with the clerk, an oath, faithfully, honestly and impartially to discharge the trust committed to him.

In the *Bischoff* case three commissioners were appointed. They did not take the oath until after the precept to the sheriff to summon a jury had been issued. Thereafter two of the commissioners took the oath while the third never took it and did not serve. It was held that the proceedings were without jurisdiction and void because of the failure to comply with the statutory requirements. In the opinion the greatest weight is given to the fact that the statute requires

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all three commissioners to act, whereas only two of them ever qualified or ever served; but there was a consideration of the question that when the precept was issued to the sheriff the commissioners' oath had not been taken.

The question before us is whether the oath should be filed *nunc pro tunc*. If the proceedings are void there is no use in directing the oath to be filed. I would say on general principles that where the statute requires an officer to take and file an oath before he performs his duties, and he takes the oath, the filing is a mere ministerial act, and if omitted it may be done *nunc pro tunc*. The officer has taken the oath required by law. What he does is done under sanction of the oath, and the omission of the mere physical, ministerial act of filing is, it seems to me, an irregularity that can be thereafter corrected. It is true that he issued the precept to the sheriff before he took the oath; but this also is a ministerial act which does not require the exercise of any judicial discretion. If the jury are regularly brought in, even without the precept, I think the proceedings would not be void. Neither do I think it would be proper to hold the proceedings void because the precept was issued to the sheriff before the oath was made. The point is that the commissioner took the oath before he entered upon the discharge of the duties that required the exercise of judicial powers.

The claim is made that the proceedings were begun in Kings county and that the oath itself was taken in Richmond county. The statute provides that the petition shall be presented to a Special Term held in or to a justice at chambers within the judicial district where the alleged incompetent resides (Code Civ. Proc. § 2323); but it is not irregular that the jury should be summoned, the hearings had and the oath filed in the county where the alleged incompetent resides or where the land affected is located although the petition may have been presented in another county within that district.

The order should be reversed, without costs, and the motion to file the oath as of the date when it was taken granted.

JENKS, P. J., RICH, PUTNAM and KELLY, JJ., concur.

Order reversed, without costs, and motion to file the oath as of the date when it was taken granted.

HOWARD S. KEEP, Respondent, v. HERBERT H. WHITE and
SOUTH SEAS PACIFIC COMPANY, INC., Appellants.

Second Department, March 31, 1921.

Ships and shipping — action by seaman left on voyage to recover damages — complaint stating action in tort remediable by maritime law — jurisdiction of State courts — joinder of parties.

A seaman has a cause of action in tort against a shipowner and master remediable by the maritime law, where he was left at a foreign port without excuse or cause, the ship proceeding with his clothing, papers and property, and the master refusing to permit him to continue on the journey or to return him home; the wrong charged is a plain violation of the fundamental duty of the shipmaster toward his crew.

Such liability is enforceable against the defendants in the courts of this State.

The joinder of the shipowner with the master was proper.

APPEAL by the defendants, Herbert H. White and another, from an interlocutory judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 7th day of January, 1921, on the decision of the court, overruling defendants' demurrers to the complaint and granting leave, on terms, to withdraw such demurrers and to answer within twenty days, rendered after a trial at the Kings Special Term.

The complaint avers that on December 8, 1919, plaintiff shipped as a seaman on the *Ajax*, for a voyage from Marblehead, Mass., to Pango Pango, Samoa, and duly signed shipping articles; that defendant White was the master of the *Ajax*, and that the South Seas Pacific Company, a domestic corporation, was the owner, of which corporation defendant White was also president. It avers that the vessel touched at Bermuda on December 14, 1919; that White as such master, and as agent for his codefendant, on December 20, 1919, maliciously and without legal excuse or justifiable cause therefor, sailed from St. George, Bermuda, leaving plaintiff, then a member of the crew, and proceeded on her voyage, carrying on said vessel plaintiff's clothing, papers and property, and refused to bring plaintiff home again, although he was in a condition to return, and willing to return, and refused and prevented plaintiff from continuing on said voyage, and left

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plaintiff, an American citizen, at St. George, aforesaid, against his will and contrary to law, and to the statutes of the United States in such case made and provided.

The statute mentioned (Fed. Crim. Code [35 U. S. Stat. at Large, 1146], § 295; U. S. R. S. § 5263, originally section 10 of act of March 3, 1825 [4 U. S. Stat. at Large, 117]) imposes a fine of not more than \$500 or imprisonment for not more than six months, or both, on any master or commander of a vessel of the United States, who, while abroad, maliciously and without justifiable cause "forces any officer or mariner of such vessel on shore, in order to leave him behind in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return, when he is ready to proceed on his homeward voyage."

Philip L. Miller, for the appellants.

John Howard Corwin, for the respondent.

POTNAM, J.:

As this is a cause of tort (in which the shipping articles are referred to by way of inducement), which occurred at Bermuda, defendants rely on the maritime law (*Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372), which raises the point whether the tort set forth is remediable by the maritime law. Of this I have no doubt. The wrong charged is a plain violation of a fundamental duty of the shipmaster toward his crew. (*Boston v. Ocean Steamship Co. of Savannah*, 197 Mass. 561.) It may be likened to the duty to go into port for medical assistance for an injured seaman, for breach of which the master of the vessel may be answerable in damages. (*The Iroquois*, 194 U. S. 240; *Olsen v. The Scotland*, 42 Fed. Rep. 925; *The City of Carlisle*, 39 *id.* 807.) The admiralty doctrine that limits recovery to "maintenance and cure" is not applicable to a breach of the shipmaster's personal obligation. Such liability is enforceable against the defendants in the courts of this State. (*Searff v. Metcalf*, 107 N. Y. 211; *Leone v. Booth Steamship Co., Ltd.*, 189 App. Div. 185.) In *Chelentis*

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v. *Luckenbach Steamship Co.* (*supra*) the seaman sued at common law for full indemnity with no claim for maintenance or cure. A verdict for defendant was held rightly directed because plaintiff's disclaimer of maintenance and cure left no ground of liability. *Johnson v. Standard Transportation Co.* (188 App. Div. 934) was also for negligence at common law, and was so tried, with no suggestion of unpaid wages or other failure of maritime duty. On such a record there was no basis for applying the maritime law. It was not intended to declare in that decision that in a proper case the State court could not administer the maritime law. The objection here of joinder of the shipowner, which might be good in a suit for wages, does not apply in tort.

I advise, therefore, that the interlocutory judgment be affirmed, with costs, but with leave to answer within twenty days after service of the order herein.

MILLS, RICH, BLACKMAR and KELLY, JJ., concur.

Interlocutory judgment affirmed, with costs, but with leave to answer within twenty days after service of the order herein.

UNITED STATES TITLE GUARANTY COMPANY, Respondent,
v. ARTHUR A. BROWN, Appellant.

Second Department, March 31, 1921.

Attorney and client—contract by corporation to represent land-owners in condemnation proceedings—invalid agreement by corporation to divide fees and allowances with attorney—second agreement under which all fees and allowances were payable to attorney did not divest payment made under first—attorney need not account for fees received from outside parties—attorney must account for money equitably due plaintiff.

The plaintiff, a corporation, entered into a formal contract whereby the defendant, an attorney, agreed to appear of record for and represent land-owners in condemnation proceedings, who had engaged the plaintiff to care for their interests, and to divide the fees and allowances with the plaintiff, and to act exclusively for the plaintiff so that any retainer that he should accept from other landowners would be for plaintiff's benefit. Proceedings were had and payments made under this contract for some time when

another contract was made by which all counsel fees and allowances should go to the defendant, and he was to refund advances made by plaintiff to cover witness fees, but the percentages which landowners agreed to pay plaintiff remained unaffected and defendant was to account for them. In an action in which said contract was declared void, *Held*, that the payments made under the first contract were not divested by the second contract.

The defendant was not obliged to account to the plaintiff for fees and percentages received by him from property owners who had no contract relations with the plaintiff.

The illegal agreement between the parties even when its illegality was declared still left the defendant under a duty to make restitution to plaintiff for money equitably due to it.

APPEAL by the defendant, Arthur A. Brown, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 26th day of April, 1920, on the decision of the court rendered after a trial at the Kings Special Term, adjudging as void and terminating the agreement between the parties of July 22, 1910, as well as all agreements, having or relating to that subject-matter, and directing that defendant make restitution to plaintiff for the sum of \$6,989.99, with interest, together with costs.

This litigation has been before considered in 158 Appellate Division, 542; 86 Miscellaneous Reports, 287; 136 Appellate Division, 688, and 217 New York, 628.

When the city of New York began to condemn lands for its Catskill water supply, plaintiff engaged in the business of representing defending landowners. For this purpose it had a department for such condemnation, and maintained a branch office at Kingston. Originally Mr. H. T. Slosson had appeared as attorney of record for such owners, who had employed plaintiff on a percentage basis. At that time defendant had not been admitted to the bar.

Later, in February, 1908, a formal agreement was made between plaintiff and the defendant. It referred to pending and to future condemnation proceedings which he was to conduct. He was to divide equally with plaintiff all allowances up to \$57,000. Above that figure, plaintiff was to have seventy-five per cent of all such allowances and counsel fees. Other provisions related to the expenses to be advanced by plaintiff, and to be accounted for in weekly statements, Brown

was to act exclusively for plaintiff, so that any contract or retainer from any person that he should accept, and any compensation thereunder, should be for plaintiff's sole use and benefit. Mr. Slosson was to be compensated out of Mr. Brown's share. Plaintiff also agreed on \$130 as a weekly allowance to Brown and Slosson.

This exclusive representation was declared to involve services "so peculiar and individual in their character as to entitle said Company to an injunction restraining said Brown and said Slosson from violating any of the covenants herein above set forth for their exclusive services in the prosecution, preparation for trial and trial of such proceedings in the Counties of Ulster, Greene, Delaware and Schoharie."

Proceedings were had and payments were made without friction or controversy for about two years. But in 1910, at the instance of counsel for the city of New York, an investigation into this division of counsel fees and court allowances was started. The Special Term in Ulster county sent the matter to a referee, a step that seems to have moved the parties to make a new and different contract (Exhibit 1), which was signed on July 22, 1910, to become effective a few days later. By this (1910) agreement all allowances and counsel fees should go to Brown, out of which he was to pay counsel with the costs and expense of witnesses; also Mr. Slosson's charges; and as outlays should be collected, he was to refund to plaintiff its advances for past witness fees. The percentages that the landowners had contracted to pay plaintiff remained unaffected, and defendant undertook to account for them as he collected them.

After the complaint in this action had been finally sustained, the cause came on for trial at Special Term, where an interlocutory judgment was rendered on July 7, 1914. This adjudged as void and canceled the agreement of July 22, 1910, as well as all agreements between the parties having reference to the subject-matter thereof. The defendant was decreed to account "for and pay to the plaintiff the amount of the percentages of the awards collected by him on behalf of the plaintiff." He was to account also for "moneys paid to him by plaintiff for expenses and witness fees of the proceedings in which he acted under contracts made with the

plaintiff or with the defendant or with Harrison T. Slosson, and that he account for and pay over to the plaintiff such expenses as were advanced to him by the plaintiff and were thereafter allowed by the condemnation commissioners in such proceedings, and which were collected and were retained by the defendant."

After proceedings before a referee, his report was set aside, and the order of reference vacated on December 2, 1918. Instead of appointing another referee, the learned justice at Special Term himself undertook the burden of going on with the hearing of this delayed accounting. After taking proofs he filed his decision and findings, upon which was entered the judgment now under review. An appeal, heard herewith, from his order declining to modify his judgment (except to grant a stay pending the appeal) is the subject of a separate decision (196 App. Div. 909).

On this appeal it was urged that the agreement of July 22, 1910, not only had displaced the prior agreement of 1908, but by its retroactive effect had divested plaintiff of payments actually made and accepted under the first agreement. It was also contended that the judgment should not include an item of \$3,821.49 for percentages or fees from property owners, who had not entered into any retainer or contract with plaintiff.

Frederick N. Van Zandt, for the appellant.

Benjamin Reass [*Hugo Hirsh* and *Emanuel Newman* with him on the brief], for the respondent.

PUTNAM, J.:

We hold that the payments by defendant made under the 1908 agreement were not divested by the second (1910) agreement. This conclusion is fortified by the subsequent transactions and the course of continued remittances, which plainly show the practical construction that the parties themselves placed on these agreements.

However, the item of \$3,821.49 for fees and percentages received from outside property owners, stands on a different ground. Such property owners had no contract relations with or through the plaintiff. The opinion of the trial court and

the interlocutory judgment thereon do not go so far as to call defendant to account for such outside fees. The interlocutory judgment, which fixed the terms and limitations of this accounting, required that the "defendant account for and pay to the plaintiff the amount of the percentages of the awards collected by him on behalf of the plaintiff."

But apart from these specific provisions limiting the scope of the accounting, there is no satisfactory ground in law or equity to decree to plaintiff such percentages from outside persons standing in no privity with the plaintiff.

This illegal agreement, even when its invalidity had been declared, we have held still left defendant under a duty to make restitution to plaintiff for money equitably due to it. But plaintiff as a corporation cannot be decreed counsel fees judicially allowed for compensation to other landowners. That would enforce and affirm the very invalidity that has been denounced. The whole \$3,821.49 was collected after September 30, 1911, and of that sum \$1,182.14 was received after this suit had been begun.

On September twenty-seventh defendant offered a payment of \$11,031.78 upon the express understanding "that all disputes to date are settled and that hereafter I am only to pay you whatever fees I collect under your contracts and such witness fees as are collected by me on cases where you paid or advanced the witness fees." In the following January defendant took substantially the same ground.

This offer of September twenty-seventh was formally accepted by plaintiff's attorney, with a reservation not material here. Probably for want of consideration this exchange of letters and the ensuing payment did not make an effective release. It, however, separated and marked off such later collections from those of plaintiff's moneys equitably due. Plaintiff had no equitable claim to share in such fees which are *res inter alios*, and are only brought into the controversy as the fruit of an illegal and illicit secret agreement. The determination by the trial court did not go as far as this. It would be against equity precedents. (*McMullen v. Hoffman*, 174 U. S. 639.) Such invalidity need not be specially pleaded. (Williston Cont. § 1630a.)

The annulment of this contract, therefore, left plaintiff

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entitled only to what was its own money and to restitution and repayment of its advances. Plaintiff may not have such fees as a form of damages for the breach of one of the illegal covenants, namely, to pay or divide counsel fees in suits not connected with retainers of the plaintiff. (13 C. J. 448, n. 24.)

The items of the \$3,821.49 do not represent unpaid disbursements by plaintiff. The opinion does say: "The plaintiff advanced witnesses' expenses in most, if not all, of these cases." But in other totals all these advances have been charged against defendant and are embraced in this accounting.

The recovery should, therefore, be reduced by striking out and excluding the item of \$3,821.49, and as thus modified, the judgment should be affirmed, with interest and costs of the action, but without costs of this appeal to either party.

Present — JENKS, P. J., RICH, PUTNAM, BLACKMAR and JAYCOX, JJ.

Recovery reduced by striking out and excluding the item of \$3,821.49; as thus modified the final judgment is unanimously affirmed, with interest and costs of the action, but without costs of this appeal to either party. Settle order with corrected findings on notice.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLES RAGAZINSKY and JOHN KIRTIKLIS, Appellants.

Second Department, March 31, 1921.

Crimes — trial — evidence corroborating identification — evidence that complaining witness pointed out defendants in line of several men is inadmissible.

On a prosecution for robbery it is reversible error to admit evidence of police officers and the complaining witness that the latter pointed out the defendants, who were lined up with several other men, as the ones who committed the crime.

APPEAL by the defendants, Charles Ragazinsky and another, from a judgment of the County Court of the county of Queens, rendered on the 9th day of December, 1918, convicting them

of the crimes of robbery in the first degree, grand larceny in the first degree and assault in the second degree.

Over the objection and exception of the defendants the trial court admitted evidence by police officers and the complaining witness to the effect that several men were lined up and the prosecuting witness pointed out the two defendants as the persons who committed the crime.

Otho S. Bowling [Robert H. Elder and Charles E. Russell with him on the brief], for the appellants.

Joseph Lonardo, Assistant District Attorney, for the respondent.

BLACKMAR, J.:

The defendants were convicted of the crimes of robbery, grand larceny and assault, committed upon the complainant on the 15th day of February, 1918. They were tried in December, 1918, and a certificate of reasonable doubt was granted on the ground that upon the trial there was a violation of the rule of evidence laid down in *People v. Jung Hing* (212 N. Y. 393) and *People v. Seppi* (221 id. 62). Upon the argument of the appeal the district attorney appeared and frankly stated that he was not able to justify the ruling of the court in view of such decisions of the Court of Appeals. We have examined the record and agree with the district attorney that such error was committed and that there is no principle of law which, giving due recognition to the rule laid down in the cases above cited, justified the admission of the evidence. The sole litigated issue in the case was the identity of the defendants, which rested practically on the testimony of the complainant. The testimony erroneously admitted would tend strongly to induce in the minds of the jurors an acceptance of complainant's identification of the defendants as those concerned in the robbery.

We have noticed a disinclination on the part of many prosecutors and of some judges to accept the law as laid down by the Court of Appeals in the two cited cases. This either imposes upon the appellate court a laborious attempt to find some other theory on which the evidence so condemned could be admitted, or results in a reversal of the judgment. It

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would conduce to a desirable finality in criminal trials if the rule of law as to the admission of evidence such as that condemned in those cases should be recognized to its full extent, both by prosecutors and by the trial courts.

The judgment of conviction of the County Court of Queens county should be reversed and a new trial ordered.

MILLS, RICH, PUTNAM and KELLY, JJ., concur.

Judgment of conviction of the County Court of Queens county reversed and new trial ordered.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRED H. HAILE, Appellant, v. FRANK B. BRUNDAGE and Others, as Assessors of the Town of Clare, in the County of St. Lawrence and State of New York, Respondents.

Third Department, January 5, 1921.

Taxation — review of assessment of property including mineral deposits — assessment sustained — presumption as to validity of assessment — burden of proof — when determination of assessors will not be disturbed — determination of value and amount of property where evidence leaves matter in doubt — assessors not limited by rules of evidence — question as to inequality not presented — costs under Tax Law, section 294.

In a proceeding to review the assessment of property including separate mineral property in which a referee was appointed, *held*, that the relator has neither overcome the presumption that the assessment is correct and that the assessors did their duty nor met the burden of proof to show that the assessment is erroneous.

The determination of assessors will not be disturbed unless it clearly appears that injustice has been done the relator and that the assessment does not represent the fair value of the property assessed.

If the evidence leaves the matter in doubt, it is the province of the assessors to determine the value and amount of property liable to taxation.

The assessors in seeking information to determine the amount of an assessment are not limited to the rules of evidence prevailing in courts.

The papers and evidence in this case do not present any question as to inequality which the court was called upon to decide.

Assessors are entitled to costs and disbursements under section 294 of the Tax Law where the assessment is sustained.

APPEAL by the relator, Fred H. Haile, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of St. Lawrence on the 28th day of August, 1918, on the decision of the court rendered after a trial at the St. Lawrence Special Term, and also from an order entered in said clerk's office on the 28th day of August, 1918.

James C. Dolan, for the appellant.

G. T. Chaney [*Thomas Spratt* of counsel], for the respondents.

Determination unanimously confirmed, with fifty dollars costs and disbursements, on the opinion of VAN KIRK, J., at Special Term; JOHN M. KELLOGG, P. J., not sitting.

The following is the opinion delivered at Special Term:
VAN KIRK, J.:

In this proceeding to review the assessment of the relator's property, a referee was appointed to take the evidence and report the same to the court, with his findings of fact and conclusions of law, which shall constitute a part of the proceedings, upon which the determination of the court shall be made. (Tax Law, § 293, as amd. by Laws of 1909, chap. 330; Laws of 1911, chap. 302; Laws of 1916, chap. 323, and Laws of 1920, chap. 643.) Such reference is to inform the conscience of the court, which can adopt the referee's findings or disregard them and draw its own conclusions. (*Marshall v. Meech*, 51 N. Y. 140.) The findings of the referee are a part of the proceedings, upon which the court shall make its determination; it may accept the findings in part and in part make its own findings. The presumption is that the assessment is correct and that the assessors did their duty. (*People ex rel. Kellogg v. Wells*, 101 App. Div. 600, 603.) The burden is on the relator to show clearly that the assessment is erroneous. (*People ex rel. Jamaica W. S. Co. v. Tax Comrs.*, 196 N. Y. 39; *People ex rel. Green v. Hall*, 83 Hun, 375.) The determination of the assessors will not be disturbed, unless it clearly appears that injustice has been done the relator, and that the assessment does not represent

the fair value of the property assessed. (*People ex rel. West F. I. Co. v. Davenport*, 91 N. Y. 574.) If the evidence leaves the matter in doubt, it is the province of the assessors to determine the value and amount of property liable to taxation. (*People ex rel. Osgood v. Comrs.*, 99 N. Y. 154; *People ex rel. B. E. M. Co. v. Wemple*, 129 id. 543, 558; *People ex rel. P. R. R. Co. v. Comrs. of Taxes*, 104 id. 240; *People ex rel. R., W. & O. R. R. Co. v. Haupt*, Id. 377, 381.) In *People ex rel. R., W. & O. R. R. Co. v. Haupt* (104 N. Y. 377, 381), the court, after speaking of the conflicting evidence as to value and the opinions of experts, said: "Back of all that remained the observation and judgment of the assessors." Courts are not called upon to draw over-fine distinctions. Assessors generally are not experts on values; and the value of property often involves elements of uncertainty. The best experts vary widely in estimating values of property. The assessors, in seeking information and determining the amount of an assessment, are not limited to the rules of evidence prevailing in courts; they acquire information from observation, from hearsay, from inquiries and from the opinions of others. Proceedings to review taxes are always difficult for the courts, and this case contains an element of unusual difficulty. Ore is buried under the land surface; even when a mine is worked beyond the openings and workings the ore is concealed. Experienced men, who know the rocks and the natural deposits of ore and the relations and conditions under which it is usually found in paying quantities, can make a better estimate of the extent of the deposit, where and how its richness will vary, and its value, than can the inexperienced and the unlearned; but there must be some conjecture in fixing the value. Yet minerals may be conveyed separate from the soil, and held as a separate property. They may have a value and are assessable; in fact, they constantly are assessed. The assessors were called upon to fix the true value of this separate mineral property and to assess it. It is not a valid objection, in estimating the value of mines and minerals, that the value is somewhat conjectural. (*State v. Moore*, 12 Cal. 56.)

I have examined the evidence in the case and am constrained to hold that the relator has not in this case met the

burden of proof. Upon the question of value, the tendency of the relator's evidence was to show that it is impossible to say what its value is. The one expert, Mr. Moore, examined for the relator testified that in his opinion no man could form a just estimate of the value of the property. The relator did not attempt by any evidence to fix the real value, nor did he claim the property had no value. The evidence, taken as a whole, seems to me to uphold, rather than overthrow, the assessment made.

Apparently the referee has concluded that it is not necessary in this case for the relator to meet the burden of proof and overcome the presumption that the assessment is right; but rather that the assessors must meet the burden of proof. The able referee has evidently given careful consideration to the evidence in the case, but in this conclusion I think he fell into error. The evidence does not show that the assessors overvalued the property, and their estimate must stand.

The referee properly has not passed upon inequality in valuation. I do not think the papers and evidence in the case present any question as to inequality which the court is called upon to decide. The defendants are entitled to costs and disbursements (as provided in the Tax Law, § 294) against the petitioner.

BERTHA MILES, as Administratrix, etc., of FLOYD R. MILES,
Deceased, Appellant, v. NEW YORK CENTRAL RAILROAD
COMPANY, Respondent.

Third Department, January 5, 1921.

Railroads — personal injuries — when release by injured person valid although resulting complications cause death for which company would otherwise be liable — mutual mistake of fact.

A release given by a mail clerk at the instance of a claim agent of a railroad company for an injury sustained the day before in a collision whereby he was thrown to the floor of the mail car and injured, is valid, even though the railroad company's negligence be conceded, and will defeat an action brought by the administratrix to recover damages for his death which resulted several months after the release was given, where no

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fraud was practiced at the time the release was procured, nor any advantage taken of the injured person, the release being based on the conditions which each party thereto thought at the time to exist and not on a mutual mistake of fact.

WOODWARD, J., dissents.

APPEAL by the plaintiff, Bertha Miles, from an order of the Supreme Court, made at the Madison Trial Term and entered in the office of the clerk of the county of Madison on the 10th day of December, 1919, granting defendant's motion to set aside the verdict and for a new trial made upon the minutes.

Charles A. Hitchcock, for the appellant.

Warnick J. Kernan, for the respondent.

Order affirmed, with costs, on the opinion of KILEY, J., at Trial Term.

All concur, except WOODWARD, J., dissenting; KILEY, J., not sitting.

The following is the opinion delivered at Trial Term:

KILEY, J.:

At a term of this court commencing May 5, 1919, the above action was tried, resulting in a verdict in favor of the plaintiff. Plaintiff's intestate, her husband, for several years prior to December 13, 1915, was a mail clerk, working as such on defendant's train, over its road between Syracuse and New York. On the 13th day of December, 1915, the train upon which he was working collided with another train at Utica, N. Y. Plaintiff's intestate was thrown to the floor of the car and was injured. He continued as far as Albany and returned home. A physician was called the day he returned. The injuries suffered by reason of the collision and fall upon the floor of the car were the result of defendant's negligence, so conceded upon the trial.

On the 14th day of December, 1915, one E. S. Bavis, claim agent of defendant, called upon Mr. Miles at his home in the village of Canastota, N. Y., and paid him \$250, for which Mr. Miles executed, acknowledged and delivered to defendant a release, in part as follows:

“ Witnesseth. That said Railroad Company hereby agrees that it will pay to said claimant the sum of two hundred fifty and no/100 dollars, as the sole consideration and without any other promise or agreement, the said claimant hereby agrees that he will accept and receive the said sum from said Railroad Company in full payment, satisfaction and discharge of all claims, demands and causes of action against said Railroad Company, and especially from all claims and demands arising from injuries received by said claimant at or near Utica, State of New York, on or about the 13th day of December, 1915.”

Mr. Miles died May 31, 1916. Subsequently plaintiff, as administratrix of her husband's estate, brought this action, alleging that from the injuries received at the time of the collision there developed spinal meningitis, which resulted in the death of her husband. Plaintiff set out in her complaint the release given by her husband to defendant and sought to avoid it on the ground that the parties were laboring under a mutual mistake as to the extent of the injuries involved. No claim was made in the complaint or upon the trial that any fraud was practiced upon or toward the plaintiff's intestate; no claim that any advantage was taken of Mr. Miles; no claim that he was incompetent.

Upon this motion defendant argued that under the circumstances surrounding the execution and delivery of the release it should stand. Also that the verdict is against the weight of evidence as to the cause of death. The verdict of the jury should not be disturbed on the last proposition.

The validity of the release presents a different and more difficult question. The plaintiff urges that the only question to be decided upon this motion is whether or not the release was based upon a mutual mistake of fact. In view of the important principle involved here, it is necessary to consider what constitutes a “ mutual mistake of fact ” so far as the circumstances, disclosed by the evidence, are applicable to the expression and what it is intended to represent. It can mean but one thing in this case, viz., that plaintiff's intestate did not anticipate that the injuries he received would cause the development of spinal meningitis and that his death would follow as a result. That defendant, through its claim agent,

did not anticipate that such injuries would produce spinal meningitis and cause the death of Mr. Miles. It would seem that this is the broadest scope that can be given to the expression "mutual mistake of fact" when viewed in the light of the evidence in this case. I think it may be fairly held that neither party to the release anticipated or considered the fatal termination which followed the injury, and the settlement made as shown by the release.

Is this sufficient ground to set aside the release? If that was the only element to be considered it would be a troublesome proposition in view of some of the decisions that have been made. However, in this case the facts and circumstances, as shown by the record, must be taken into consideration. It appears that the defendant, through its claim agent, did not have any knowledge except what he obtained from Mr. Miles and what he could see of him on the morning he was there for the release. The only facts existing at that time the plaintiff's intestate knew, and told them to defendant's agent, viz., that he was thrown to the floor of the car and was bruised and shocked, no bones broken, no lacerations of flesh or muscle; what subsequently developed was not in existence at that time and not for some weeks or months later; and what did subsequently develop was not the natural or usual result of such an injury. Thus we are brought to the question, what was considered by either or both of the parties to the release? Mr. Bavis says he was there to get a release that would foreclose any further claim against defendant on the part of Mr. Miles. He admits that he might have said he thought that Mr. Miles would be out in a few days; but that must have been based upon the extent of injuries then known and disclosed to him by the injured person; that was a mere expression of opinion and does not sustain the claim that there was a mutual mistake of fact on his part. *Houghton v. Houghton* (34 Hun, 212), cited by plaintiff, has many features not found in this case; no consideration. The grantor "was induced and persuaded," and the subsequent acts of grantee colored the reasoning of the eminent jurist who wrote the decision; this appears from the following found in the opinion: "It is also inferable, from the allegations of the complaint, that the plaintiff did not intend to make

his deed irrevocable except in case of his death, and that would furnish a basis for the action * * *." In *Kirchner v. New Home Sewing Machine Co.* (135 N. Y. 182), also cited by plaintiff, the question of actual concealment, on the part of a releasee, of conditions of which the releasor did not have knowledge, and further that the restrictions in the release were not destroyed by the general clause contained at the foot of the release. In other words, it was held that there was a cause of action not intended to be included. The same authority lays down this general rule: "It is competent for a party by his own act to forego recovery for unknown as well as known causes of action."

Distinct from what the evidence in that case led the court to conclude, the justice makes this observation at page 189 of the opinion: "If the plaintiff can show that by a mutual mistake of the parties, or by what is its equivalent, a mistake on his part and fraud on the part of his adversary, the present cause of action is embraced in the release, contrary to the intent of the parties, or contrary to his intent in case fraud is proven, he is entitled to an instruction to the jury to the effect that the release does not bar his right to recover." This is a general rule laid down which may have to give way or submit to modification, according to the facts of the case being considered. In the case at bar the element of fraud or misrepresentation is absent. The defendant knew the facts only as stated by the releasor and he stated them as they were at that time. What was the position of plaintiff's intestate as disclosed by the evidence? His physician had seen him before the call of the claim agent of defendant. He knew he was bruised and had suffered a severe shaking up; no other conditions were present at that time. The vital question for plaintiff comes in here; did the intestate consider the possibility of something developing in the future from this injury which he did not and could not know at that time? Did he speculate on the chance that some unforeseen result might follow? According to what took place at the time of the execution of the release, as detailed by plaintiff who was present, he bargained for a higher sum than was first offered, and after the sum finally accepted by him was reached, he still hesitated and appealed to his wife, this

plaintiff, as to whether he had better take the chance. Her advice, twice given, was to wait until time would disclose further impairment, symptoms, results of development, and notwithstanding this advice he concluded to and did take the chance.

It would seem that the opinion in *Chicago & N. W. Ry. Co. v. Wilcox* (116 Fed. Rep. 913) more nearly covers the circumstances in this case than any other case cited or examined.

The plaintiff in that action was a woman upwards of sixty years of age; she was injured on defendant's road and through the negligence of defendant; the injury was the breaking of her hip; her physician and the railroad physician were the same person. She claimed she was advised by the physician that she would be out or well in a year. She accepted \$600 in settlement and executed a release, upon what constituted or did not constitute "a mutual mistake." The court wrote in part as follows:

"A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and every one who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties. * * * Conceding, for the moment, that the doctor and the agent told the complainant that there was no doubt that she would be well in a year; that she believed this statement; that she relied upon it, and that she has never recovered — still these facts do not establish a mistake of fact which will

warrant the avoidance of a solemn agreement of settlement. The mistake which they established was a mistake in prophecy, in opinion regarding the happening of a future event on the part of the doctor and of the agent, and a mistake in belief as to what the future had in store for her on the part of the complainant. The future duration of the disability, the future effects of the injury, were not matters of fact, but matters of conjecture, of opinion, of belief. The only material facts which conditioned the contract of compromise were the injury which the complainant had received and the acts of the railway company which caused it. These the complainant knew as well on the day she signed the release as she has ever known them. The future duration and the ultimate effects of the injury were unknown and unknowable future events, a mistake concerning which was a mere mistake of opinion or of belief, and not a mistake of fact. * * * The physical and mental condition of the sufferer, the state of his vital organs, his age, his habits of life, the character and temperament of his nervous system, and many other conditions that it is impossible to enumerate or even conceive, inevitably affect the duration and the character of his disability and the amount of his suffering."

In *Lumley v. Wabash Railroad Company* (76 Fed. Rep. 66, 71) the following statement appears in the opinion of the court: "If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release."

Again, in *Great Northern Railway Company v. Fowler* (136 Fed. Rep. 121) the court discusses the subject of "mutual mistake" as follows: "The appellant's surgeon made an apparent cursory examination of the appellee's injuries, and found that they consisted of a wound of the scalp, a contusion of the shoulder, and nothing more, and expressed his opinion that the appellee would be ready to go to work again in two weeks. The appellee consulted no other physician as

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to the extent or probable duration of his injury. He was a sick man at the time when he made the settlement. He accepted the statement and opinion of the appellant's surgeon, and, on the basis of it, received \$195, and signed the discharge. We entertain no doubt that such a release, executed under a mutual mistake of facts so induced by the appellant, should be set aside. It is true that where there is no misrepresentation or fraud on the part of the releasee, a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he thought them to be, even though his opinion at the time of making the settlement may have been based upon that of a physician employed by the releasee to examine and report on the extent of his injuries. Such was the case of *Nelson v. Minneapolis Street Ry. Co.*, 61 Minn. 168; 63 N. W. Rep. 486."

In the present case the defendant was negligent, its negligence caused the injuries for which plaintiff brings this action, and if she is correct as to the cause of her husband's death, that negligence subjected and subjects plaintiff and her family to hardship and deprivation. The decision reached is reluctantly reached, and because there seems no legal escape from it. The decision of the jury if upheld would make, not only contracts of this kind insecure, but the same principle would apply to all contracts when the party losing by such contract could avoid the same by claiming there was a mutual mistake on the part of each party to the contract, or a mistake on his part and fraud on the part of the other party. As to some contracts the remedy and relief are proper; but should not be extended to contracts executed under the circumstances surrounding the execution of this contract. It will be noted that there was no fraud alleged or proved, no misrepresentation either active or passive, all parties were competent. The injuries and the extent thereof, so far as known, were discussed and considered, and after such discussion and consideration, \$250 was paid for the release by the defendant. Such a contract should not be set aside.

Motion is granted, the verdict is set aside and new trial granted, with costs to abide the event.

SARAH KANTER, Respondent, v. NEW AMSTERDAM CASUALTY
COMPANY, Appellant.

First Department, April 1, 1921.

Landlord and tenant — covenant to make alterations — action on bond to secure performance of covenant — defendant estopped from claiming that plaintiff, original lessee, not entitled to recover as if owner — measure of damages is cost of alterations — recovery not limited to amount deposited as general security.

In an action on a bond given by the defendant to pay a specified amount, on the non-performance of a covenant in a lease binding the tenant to make alterations, it appeared that the plaintiff, who was the original lessee with a long term lease, leased the premises to the defendant's principal for a long term; that the tenant never entered into possession or paid the rent or made the alterations and was duly dispossessed within a short time after the time for delivery of possession, and that after the expiration of the period in the lease for the completion of the alterations this action was commenced.

Held, that the defendant was estopped from claiming that the plaintiff's title or right to the use and enjoyment of the premises in question, she being herself a lessee, was not for such a period as would entitle her to recover as if she were the owner;

That no objection having been made that the plaintiff's reversionary interest was not for such a period as to entitle her to recover as if the owner, the true measure of damages as against the tenant would have been the cost of the alterations, and that a recovery against the surety to the amount of the bond, which was less than the cost of alterations, was proper.

The amount of damages that the plaintiff may recover for a violation of the covenant to make alterations to secure the performance of which the bond in suit was given, is not limited to the amount of a deposit made by the tenant under a later clause in the lease which was to be considered as damages for the violation of covenants generally.

MERRELL and PAGE, JJ., dissent, with opinion.

APPEAL by the defendant, New Amsterdam Casualty Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of April, 1920, on the decision of the court rendered after a trial at the New York Trial Term, a trial by jury having been waived.

Frederick Mellor, for the appellant.

William Kaufman of counsel [*Salomon & Plumer*, attorneys], for the respondent.

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LAUGHLIN, J.:

It is true, as stated in the opinion of Mr. Justice MERRELL, that the interest of the plaintiff in the premises was not specifically shown on the trial. It appears, however, that on the 7th day of November, 1917, she executed a lease of the premises in writing to The 115th Street Garage Company, Inc., for the term of twenty-one years commencing on the 1st day of January, 1918, at the annual rental of \$4,200 payable in equal monthly installments, and that the lease was given on the express condition that the tenant at its own expense should forthwith proceed to make the necessary alterations to change the stable then on the premises into a garage and would complete the same on or before the 1st of June, 1918. It further appears that the lease provided that simultaneously with the execution and delivery thereof the tenant should cause to be executed and delivered to the plaintiff the bond of the defendant containing certain provisions identified by reference to another instrument, and that the bond on which the action is predicated was procured to be executed by the defendant and delivered to the plaintiff pursuant to and in conformity with the obligations of The 115th Street Garage Company, Inc., under the lease. Plaintiff alleged that she held a lease of the premises dated September 9, 1916, and that at all times mentioned in the complaint she was and still is the lessee thereof. These allegations were put in issue by the answer and no proof thereof was given other than such inference as might be warranted from the fact that she made the lease of the premises for twenty-one years. The court found at the request of the defendant that the plaintiff was the lessee of the premises and also found that she was lessee "under a long term lease." No point with respect to plaintiff's title or interest was made on the trial. It appears to have been assumed by the defendant in making the bond that the plaintiff was the owner for it is so recited in the bond. It is now claimed by the appellant that the plaintiff was not the owner but it does not claim that her reversion did not give her the right to the use of the premises for such a period as would authorize a recovery under the rule applicable to an owner. In appellant's first point plaintiff is regarded as the owner and it is argued that her only right as such was to have the alterations made lawfully, if

made at all, but that she exacted no obligation of the tenant to make them. It also claims that the lease made by the plaintiff was canceled by the dispossession proceedings and by the resumption of possession by her in her own right and not as agent of the tenant and that, therefore, she must be deemed to have accepted surrender of the premises and that thereby the defendant's principals were discharged. It is further argued that she was not entitled to possession with the building altered as contemplated until the expiration of the term of twenty-one years and that the damages recoverable by her were limited to the \$350 deposited by the tenant as security for the performance of the conditions of the lease. I am of opinion, therefore, that the defendant should now be deemed estopped from questioning plaintiff's title or right to the use or enjoyment of the premises for such a period as would entitle her to recover as if she were the owner. The contention that the damages are limited to the \$350 deposited by the tenant is not tenable. The lease executed by the plaintiff to The 115th Street Garage Company, Inc., contains twenty-six paragraphs embodying covenants and agreements on the part of the tenant in addition to the provisions for altering the building and it is provided in paragraph 2 which contains those provisions that the lease is given upon the express condition that the tenant shall make the alterations as therein provided. The provisions with respect to the deposit of \$350 by the tenant are contained in paragraph 20 and it is therein recited that \$350 has been deposited by the tenant with the landlord "as security for the faithful performance of all the terms, covenants and conditions in the said lease contained," and it is provided that if the tenant surrenders the premises or is dispossessed or defaults or violates any of the terms, covenants or conditions contained in the lease, the amount so deposited shall belong to the landlord as liquidated and stipulated damages and it is provided that the parties have so stipulated for the reason that they cannot ascertain the exact amount of damages which the landlord would sustain in the event of any breach or violation of the lease and that the amount so deposited shall be returned to the tenant with interest at three per cent per annum after the expiration of the lease. If it had been intended that the amount so deposited should be deemed the liquidated damages

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for the failure of the tenant to make the alterations it is not probable that paragraph 3 of the lease would have required the giving of a bond to be executed by the defendant in the precise terms of the bond on which the action is brought for that would be wholly inconsistent with the theory that the deposit would constitute liquidated damages for the failure of the tenant to make the alterations.

The plaintiff having exacted as a condition of making the lease that the alterations be commenced forthwith and completed before June 1, 1918, and the lease having been for twenty-one years, it cannot be presumed that the alterations were exacted with a view only to enhancing the plaintiff's reversionary interest at the expiration of the lease, for if that were her primary purpose it would be reasonable to expect that she would have required the making of the alterations toward the close of the term. It must be assumed, therefore, that the primary purpose of this requirement was security for the performance by the lessee of its obligations under the lease, and to protect the plaintiff in case she should exercise her right of re-entry in the event of a breach by the tenant warranting it. (*O'Brien v. Illinois Surety Co.*, 203 Fed. Rep. 436; *sub nom. Illinois Surety Co. v. O'Brien*, 223 id. 933; *Rock v. Monarch Building Co.*, 7 Ohio St. 244; 100 N. E. Rep. 887.) It appears that, subject to the approval of the local authorities referred to in the bond, it was well understood what alterations were to be made, for the tenant in contemplation of the making of the lease on the 17th of October, 1917, entered into an agreement with the Thomas Mulligan Construction Company, Inc., for making them and also filed plans and specifications therefor. The plaintiff showed that the reasonable cost of making the alterations would have been \$14,435. During the giving of this testimony, no point was made that the agreement with respect to the alteration was indefinite, or that the plans and specifications therefor had not been agreed upon between the plaintiff and the tenant at or before the making of the lease, or that the said local authorities would not approve said plans and specifications, or that they included any changes or alterations not required under the agreement between the landlord and the tenant, or that plaintiff was not the owner, or that her rever-

sionary interest was not for such a period as to warrant a recovery on the same basis as if she were the owner. If the objections had presented the last ground stated it might have been overcome by other evidence showing the plaintiff's title and interest and that they were such as to entitle her to recover the amount she has recovered. (See *Illinois Surety Co. v. O'Brien*, 223 Fed. Rep. 933.) The only objection made to this evidence was that the cost of making the alterations was incompetent, irrelevant and immaterial and not the proper measure of damages for the reason that plaintiff's only right was to accept the surrender or to relet the premises for the account of the tenant and, therefore, those are the only objections presented for review with respect to this item of evidence, which, if in accord with the proper rule of damages, authorized a recovery to the extent of the defendant's obligation under the bond, and that is the amount for which plaintiff has recovered. I am unable to agree either with the view that the plaintiff is not entitled to recover to the extent of the penalty of the bond or that she has failed to show any recoverable damages. The precise terms of the bond were agreed upon by the reference in the lease to a form of bond containing them, and the agreement of the defendant was not to pay the damages to the extent of the penalty of the bond, but to pay a specific amount in the event that the tenant failed to make the alterations as agreed. There is, I think, room for argument that the damages for a breach were stipulated to be the amount specified in the bond. The plaintiff, however, did not rest on this theory, but, as already stated, proved what it would have cost to make the alterations and the objection to that evidence was that it was not the proper measure of damages because she had either to accept the surrender or to relet for the account of the tenant. If the tenant had remained in possession under the lease in force when the action was brought, it could not be said that the plaintiff would be entitled to possession before the expiration of the term, and, therefore, she would have been limited to recovering damages represented by the loss of the alterations as security and for damages to the reversion. (*Illinois Surety Co. v. O'Brien*, *supra*; *Wentworth v. Manhattan Market Co.*, 218 Mass. 61.) Here, however, it appears that the time for delivery of possession was changed

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from January 1 to February 1, 1918, and that the tenant failed to enter into possession and to pay the rent and was duly dispossessed therefor pursuant to the provisions of the lease after March first, and that after the expiration of the period specified in the lease for the completion of the building, this action was brought. Therefore, the rights of the tenant had terminated and the landlord had come into the reversion prior to the commencement of the action. If the tenant had performed the agreement, for the performance of which the bond was given, the landlord would then have come into the possession of the altered building, but of that right she was deprived by the breach of the agreement on the part of the tenant. In such circumstances, no objection having been made that the plaintiff's reversionary interest was not for such a period as to entitle her to recover as if the owner, I am of opinion that the true measure of damages as against the tenant would have been the cost of making alterations. That is the rule with respect to covenants to keep premises in repair when the question arises after the landlord has regained possession of the reversion (*Appleton v. Marx*, 191 N. Y. 81) and is, in effect, the rule where a grantor takes back a purchase-money mortgage containing provisions for a building loan to be made by him to the grantee for the erection of buildings on the premises which the grantee commences but fails to complete, provided the grantor waives the loss of rental in the interim; but if he wishes to recover that also, it seems the rule to be followed, which would embrace all his damages, is the difference between the value of the premises and their value if the buildings had been completed. (*Kidd v. McCormick*, 83 N. Y. 391, and decisions therein cited.) In *Kidd v. McCormick* (*supra*) the court held that the case under review was analogous to a covenant to keep or put premises in repair; and in the later case of *Appleton v. Marx* (*supra*) it was pointedly held that the measure of damages applicable to such covenants after the landlord has come into the reversion is the cost of making the repairs. The damages, of course, accrued when the breach took place and it is not material whether the landlord or any one else thereafter made the alterations or used the premises without so doing. (*Appleton v. Marx*, *supra*; *Kidd v. McCormick*, *supra*, 397.)

I am of opinion, therefore, that the recovery was right and should be sustained and that the judgment should be affirmed, with costs.

CLARKE, P. J., and SMITH, J., concur; PAGE and MERRELL, JJ., dissent.

MERRELL, J. (dissenting):

The action is brought to recover the sum of \$4,000, being the amount set forth in a bond given by the Thomas Mulligan Construction Company, Inc., and The 115th Street Garage Company, Inc., as principals, and the defendant, as surety. It is claimed by the plaintiff that the bond was given entirely for her benefit, and was to secure the faithful performance on the part of the principals of an agreement to reconstruct into a garage a building then standing upon the demised premises and used as a stable. Plaintiff claims that she is a lessee of the premises and sublet them to The 115th Street Garage Company, Inc., under a lease containing a covenant on the part of the lessee to alter the building thereon into a garage.

On the part of the defendant, appellant, it is claimed that the defendant in executing the bond incurred no liability, except under the clause therein contained in which the principal agreed "to satisfy the owner" that the garage when built should comply with the rules and regulations of the fire, building and other city and State departments.

The learned trial court has found that the premises in question were "held by the plaintiff as lessee under a long term lease. * * * That the alteration of the stable into a garage was for the benefit of the plaintiff. * * * That the cost of said alteration is a sum in excess of Four Thousand (\$4,000.00) Dollars." The court then directed judgment in favor of the plaintiff for the sum of \$4,000, and costs. I do not think that the findings support the judgment, nor do I think that the evidence supports the findings.

The complaint alleges that the plaintiff was a lessee "holding a lease on said premises dated 9 day of September, 1916." The answer puts in issue said allegation and upon the trial the lease under which plaintiff held was not introduced in evidence and no testimony was offered with reference to

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plaintiff's tenure. The complaint further alleges that on the 7th day of November, 1917, the plaintiff entered into a lease with The 115th Street Garage Company, Inc., for said premises on East One Hundred and Fifteenth street for the term of twenty-one years, commencing on the 1st day of January, 1918, at a rental of \$4,200 per year, payable in equal monthly installments of \$350, in advance; that said premises were to be used for a garage and for the sale of automobiles, automobile supplies and accessories; that in said lease the lessee agreed, at its own cost and expense, to make the necessary alterations and changes in said premises to permit the same to be so used as a garage instead of a stable; that such repairs and alterations were to be completed on or before the 1st day of June, 1918; that such garage was to be in strict compliance with the laws governing the same in any and all departments of the city and State of New York; that it was further agreed between the parties that the tenant should, simultaneously with the execution of the lease, deliver to the plaintiff the bond sued upon; that the bond in question was executed on the 9th day of November, 1917; that thereafter the plaintiff vacated the premises and leased other premises for the purpose of conducting therein her stable business; that the lessee refused, failed and neglected to take and occupy the demised premises and made no alterations. The complaint then alleges that due notice of default was served upon the parties, as required in the lease. The complaint then alleges:

"*Fifteenth.* That by reason of the aforesaid, the plaintiff was compelled to and did vacate premises hereinbefore leased and was compelled to and did lease other premises for the conducting of her stable business and plaintiff did otherwise suffer damages amounting to Four thousand (\$4000.00) dollars."

No claim is made by the plaintiff that the parties agreed upon any forfeiture respecting any sum mentioned in the bond or that the defendant is liable to the plaintiff on any theory of liquidated damages. The complaint is drawn and the action was tried on the theory that the plaintiff has suffered damages by reason of the alleged default of the parties in failing to alter the demised premises into a garage.

Upon the trial the defendant conceded the making of the lease, the giving of the bond, the fact that no work was ever done on the plaintiff's premises, and that the plaintiff instituted summary proceedings to evict the tenant, in which proceedings the tenant defaulted. The defendant sought to prove upon the trial that the parties had voluntarily consented to the termination of the lease. The trial court held adversely to the defendant's contention in that respect, and the appellant does not question the decision of the court upon this point.

In addition to the question raised by the appellant as to the construction of the bond, it further contends that the dispossession proceedings and the occupancy of the premises by the plaintiff canceled all obligations of the defendant under the bond; that under the express terms of the lease the parties stipulated that in case of default on the part of the lessee the sum of \$350 was fixed as liquidated damages, and that no damages were proven.

The plaintiff did not offer in evidence the lease under which she held the premises, nor did she make any proof respecting her title. There is no evidence in the case to show whether the plaintiff had a lease for one year or for one hundred years, or at all. There is, therefore, no basis for an award of damages. The only evidence of damages offered by plaintiff was the testimony of one Nathan Langel, an architect. He was shown the proposed plans and specifications for the alterations which were to be made to the demised premises, and testified, under defendant's objection and exception, that the cost of such alterations would be \$14,435 without an elevator. It was disclosed that the proposed plans had never been accepted by the proper city authorities. There is no evidence in the case bearing upon the value of plaintiff's reversion, the value of the premises, or what effect the alterations would have had upon the rentals. It is, therefore, clear that the judgment appealed from is unsustainable by the evidence and should be reversed.

It is, however, proper to dispose of the other questions raised by the appellant, the most important of which is the appellant's liability under the aforesaid bond. The important portions of the bond are as follows:

" Know all men by these presents, That Thomas Mulligan

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Construction Co., Inc., and The 115th Street Garage Company of New York City (hereinafter called the 'Principal'), and the New Amsterdam Casualty Company, a corporation of the State of New York (hereinafter called the 'Surety'), are held and firmly bound unto Sarah Kanter of 1811 Lexington Avenue, New York City (hereinafter called the 'Owner') in the full and just sum of Four Thousand (\$4000.00) Dollars, to the payment of which said sum of money, the said Principal and the said Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

"Signed, sealed and dated this 9th day of November, A. D. 1917;

"WHEREAS, said Principal Thomas Mulligan Construction Company, Inc., above mentioned has entered into an agreement with the said The 115th Street Garage Co. above mentioned for the alteration of a stable owned by Sarah Kanter, aforementioned, located at #307-11 East 115th Street, into a Garage according to plans and specifications and in accordance with the rules and regulations of the Fire and Building departments of the City of New York, and has agreed to satisfy the owner of the property, Sarah Kanter, that all work done thereunder will be in accordance with said rules and regulations of the Fire and Building Departments,

"Now, therefore, the condition of this obligation is such that if the said Principal shall faithfully perform said contract on his part, according to the terms, covenants and conditions thereof (except as hereinafter provided), then this obligation shall be void, otherwise to remain in full force and effect;"

As above stated, the appellant contends that it is surety only for the faithful performance on the part of the "principal" of the agreement that "all work done thereunder will be in accordance with said rules and regulations of the Fire and Building Departments." The complaint states and the lease shows that prior to the execution thereof the lessee had agreed to give the bond sued upon. A copy of this bond was placed in the hands of the lessor's attorney prior to the execution of the lease, as stated in the body of the lease itself. The

lease bears date on November seventh and the bond on November ninth, but it is quite obvious that one of the considerations of the lease was the giving of the bond for the faithful performance on the part of the lessee of its agreement to alter the demised premises in accordance with certain plans and specifications agreed upon. It, therefore, follows that when the parties agreed in the lease that the sum of \$350 was to be taken as liquidated damages in the event of certain defaults on the part of the lessee, they did not contemplate that such sum was to be accepted in case of default under the provisions for alterations. If such were the case the liability under the bond would in no event be over \$350, which is contrary to all of the acts of the parties and contrary to the fair interpretation of the lease and of the bond itself. Assuming, therefore, for the reasons above stated, that the defendant contracted to become liable as surety to some one in the sum of \$4,000 in case of default as provided in the bond, it is necessary to carefully read the bond itself for the purpose of determining just what the defendant's liability is. At the outset it will be noted that the Thomas Mulligan Construction Company, Inc., and The 115th Street Garage Company, Inc., of New York were designated in the bond to be the "principal" and the New Amsterdam Casualty Company was named as the "surety," and that as such they jointly and severally became bound "unto Sarah Kanter" in the sum of \$4,000. The parties did not assume liability to any one else except the plaintiff, Sarah Kanter; and the surety company cannot be sued by either the Thomas Mulligan Construction Company, Inc., or by The 115th Street Garage Company, Inc., under the terms of the bond. It is, therefore, apparent that the things mentioned in the body of the bond were to be done and performed for the benefit of Sarah Kanter. While the bond itself is in the form of the usual contractor's bond, such fact does not alter the liability of the defendant to the plaintiff.

In the bond the parties referred to certain plans and specifications for the alteration of a stable "owned by Sarah Kanter," and further provided that "if the said Principal shall faithfully perform said contract on his (*sic*) part according to the terms, covenants and conditions thereof * * *, then this obligation shall be void." It is obvious that the word

"principal" means both the Thomas Mulligan Construction Company, Inc., and The 115th Street Garage Company, Inc., and that the contract clearly refers to the agreement on the part of the lessee to alter the stable in accordance with the plans and specifications, which work was to be done by the other principal, the Thomas Mulligan Construction Company, Inc. The evidence shows that Thomas Mulligan was the head of both of the principals, and that the stock of both companies was held by said Thomas Mulligan and his sons.

It seems to me that the obligation of the bond was threefold: (1) "for the alteration of a stable owned by Sarah Kanter, aforementioned, located at #307-11 East 115th Street, into a garage according to plans and specifications;" (2) "in accordance with the rules and regulations of the Fire and Building departments of the City of New York," and (3) "to satisfy the owner of the property, Sarah Kanter, that all work done thereunder will be in accordance with said rules and regulations of the Fire and Building Departments."

It seems very clear that upon default of the principals in respect of any of the acts above mentioned the defendant was obligated to respond in damages to the plaintiff and that this court should hold that the defendant is liable to the plaintiff in such damages as the plaintiff is able to show were suffered by reason of the failure of the principal to make the alterations agreed upon in the lease and the aforesaid plans and specifications.

The appellant asserts, as above stated, that it is not liable under the bond because the lease was canceled either by the dispossession proceedings or by the acceptance of the surrender of the premises and the occupancy thereof by the plaintiff. It was admitted at the opening of the case by defendant's counsel that "the tenant went into possession on February first." It appears, however, that the actual possession was postponed by agreement between the parties until March first. After that date summary proceedings were instituted to evict the tenant who had never actually taken possession. No warrant, however was issued, although the tenant made default and the plaintiff thereafter moved back into the demised premises. While the plaintiff was clearly authorized to retain the \$350 paid in advance under

the lease, neither the dispossess proceedings nor taking possession of the premises by the plaintiff released the lessee and the defendant from their obligations under the aforesaid bond. As above noted, it was clearly the intention of the parties to make a separate agreement to insure the proper alteration of the premises, and the bond sued upon was given for this particular purpose. The defendant cannot escape liability under the bond by simply proving a general default on the part of its principal which rendered summary proceedings necessary, nor are the plaintiff's damages confined to the \$350 stipulated in the lease. If the plaintiff can prove that she holds the demised premises under a long term lease, and that the alterations to the premises which the lessee agreed to make would have benefited the premises and increased the value of plaintiff's security or reversion, it is clear that the plaintiff is entitled to recover substantial damages. The alterations provided for in the lease are much more than ordinary repairs. The lessee agreed to alter the premises from a stable into a garage. It does not necessarily follow, however, that such alterations would increase the market value of the premises as a whole or the rental value thereof. It does not appear that at the time the lease was made the premises were in any respect out of repair or that any part or portion of the alleged improvements and alterations which the sublessee agreed to make were in the nature of repairs. Assuming, however, that the plaintiff will be able to prove that the alterations were for her benefit and increased the value of the premises and also the value of her leasehold estate, the measure of damages is not the actual cost of making these material alterations and improvements, but the true measure of damages is the difference between the value of the plaintiff's leasehold estate and what the value thereof would have been at the time of the breach had the lessee made the alterations and improvements agreed upon. There is a great conflict in the authorities respecting the true measure of damages in this and similar cases. When an action is brought for the breach of a covenant on the part of a lessee to make ordinary repairs and such action is brought before the expiration of the term, it is now settled that the measure of damages is the injury done to the reversion. (*Appleton v. Marx*, 191

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N. Y. 81.) When, however, such an action is brought by the landlord after the expiration of the term, the measure of damages is the cost of putting the premises in repair. (*Appleton v. Marx, supra*; *Lehmaier v. Jones*, 100 App. Div. 495; *City of New York v. McCarthy*, 171 id. 561; 2 McAdam Landl. & Ten. [4th ed.] 1326; 16 L. R. A. [N. S.] 212, n.; 16 R. C. L. 1094, ¶ 612.) The above cases, however, were decided upon the theory that the repairs which the tenant agreed to make were necessary to preserve the property and in most instances the repairs had actually been made by the landlords after default on the part of the tenant. In the case at bar, the tenant having made immediate default and having failed to actually enter into possession of the premises, it would be unfair to award to the plaintiff, she being now in possession of the premises, the full cost price of the alterations which the lessee had agreed to make under the lease, but which might not have benefited the demised property at all nor increased its market or rental value. Prior to the decision of *Appleton v. Marx (supra)* the law in this State seems to have been unsettled respecting the proper measure of damages in an action brought by a landlord upon the default of a tenant to make repairs. The lease under consideration in the last-mentioned case involved a simple covenant on the part of the lessee to make repairs. It does not follow, therefore, that *Appleton v. Marx* is any authority upon the question as to what is the true measure of damages in the case at bar.

In the case of *Kidd v. McCormick* (83 N. Y. 391) the plaintiff sought to reach certain trust funds which had been deposited for the security of the plaintiff who had sold certain lots under an agreement that the vendees should build dwellings upon them. The vendees having defaulted before the dwellings were fully constructed, it was necessary for the court to determine what damages the plaintiff was entitled to receive by reason of the vendees' default. The opinion of the Court of Appeals was written by Chief Judge FOLGER, and it was held that the plaintiff's damages were "the difference in the value of the premises, as they were with the houses unfinished, on the 1st of September, 1877, from what the value of them

would have been had the houses been finished on that date according to the contract." In his opinion Chief Judge FOLGER reviews the authorities upon the question of damages in such cases and analogous decisions respecting similar defaults by a lessee, and stated: "Sometimes it has been held that the measure is what it will cost to put in repair. [Cases cited.] Other times it has been said or intimated, that the measure would be what the landlord would lose, if he put his reversion in market and sold it; in other words, the difference between what it was worth with the premises out of repair, and what it would have been with them in repair."

The facts under consideration in *Kidd v. McCormick* are quite similar to the facts in the case at bar. The Court of Appeals in deciding *Appleton v. Marx* did not in any way overrule *Kidd v. McCormick* or similar cases which do not involve the narrow question of *ordinary repairs*. *Kidd v. McCormick* is cited with approval in *Comey v. United Surety Co.* (217 N. Y. 268). The question involved in *Comey v. United Surety Co.* was one growing out of a construction contract and was brought on a surety bond given for its faithful performance on the part of the principal. The principal defaulted and suit was brought against the surety. The court held that the plaintiff had a cause of action to recover damages for the abandonment of the contract, citing *Kidd v. McCormick* (*supra*). The court further held that the language of the bond was that of the defendants, and that words of doubtful meaning should be construed in favor of the plaintiff.

In Sutherland on Damages (Vol. 3 [4th ed.], p. 3164) the learned author says: "The measure of damages for failure of a lessee to erect a building upon premises during the term as agreed is such a sum as with legal interest would equal the fair cost of the building at the end of the term." (Citing *Wentworth v. Manhattan Market Co.*, 218 Mass. 91.)

While the rule stated by Sutherland has never been authoritatively adopted in this State, it is founded upon good logic, for in no event can a landlord who leases his property to another under a covenant to make improvements or alterations receive any benefit therefrom or enjoyment thereof until after the expiration of the term. For this reason a landlord can-

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not claim the right to both the immediate possession of the premises and the full cost of such improvements or alterations. It seems to me that all such damages are clearly included within the rule above stated in this opinion, and that the true amount which a landlord in such event is entitled to recover is the benefit which the repairs or improvements would be to his reversion or interest in the demised premises. In the case at bar the plaintiff intended to part with the possession of her premises for twenty-one years. Outside of the additional security for the rents, she could receive no benefit from the alterations for twenty-one years. It was, therefore, necessary for her to show as a foundation for her claim for damages what her actual interest was in the demised premises and how it was affected by the failure of the lessee to make the alterations which it agreed to make. I am unable to find any case in this State where the rule respecting the measure of damages as laid down in *Appleton v. Marx* has been applied to facts similar to those in the case at bar. The law also seems to be unsettled in Massachusetts. One of the leading cases in that State is that of *White v. McLaren* (151 Mass. 553). In that case an action was brought under a written agreement made by a firm of builders to do certain work and furnish certain stock and materials in accordance with certain specifications. The builders did not construct the roof of the building in accordance with the agreement. The court said: "In determining such damages, different elements are proper for consideration in different cases, according to the nature of the defect. Sometimes the measure of damages is the necessary cost of making the work according to the specifications. * * * The defect might be of such a character as to diminish the value of the house but little, while to make the work conform literally to the contract would involve reconstruction at unreasonable and disproportionate expense. The question ordinarily is, How much less is the building fairly worth than it would have been if the contract had been performed?"

A case very similar to the one at bar is that of *Illinois Surety Co. v. O'Brien* (223 Fed. Rep. 933). The plaintiff in that action held a ground lease for ninety-nine years which had run two years. The premises were sublet for ninety-

seven years with a provision in the lease for the erection of a building during the first year. To secure the performance of such agreement the lessee gave a surety company bond. The building was not erected and the lease was terminated for the default of the lessee. The action was brought against the surety company. The court held that the surety company was liable, and that the lessor's damages were to be measured by the value which the building, if erected, would have been to him as security for the performance of the lessee's covenants contained in the lease. It is quite apparent that had the court permitted the lessor in the above case to recover the cost of the construction of the building which the lessee had agreed to erect there would have been a grave miscarriage of justice. O'Brien, the plaintiff, had agreed to part with the possession of his premises for ninety-seven years in consideration of the agreement of the lessee to pay rent and to construct a building thereon and, therefore, as held by the court, was not entitled to the cost price of the structure. In the case at bar the plaintiff had agreed to part with the possession of her premises for twenty-one years for the same consideration. It, therefore, follows that the true measure of damages is as above stated, viz., the difference between the value of plaintiff's leasehold estate at the time of the breach, and what its value would have been had the alterations been made as agreed by the sublessee.

The judgment appealed from should be reversed and a new trial granted, with costs to appellant to abide event.

PAGE, J., concurs.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
BENJAMIN GITLOW, Appellant.

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Crimes — criminal anarchy — conviction for publication of manifesto in aid of Communist struggle — Penal Law, sections 160-166, relating to criminal anarchy, not unconstitutional — restraint on passage of such law by Constitution of United States — construction of legislation preventing abuse of free speech — common-law theory of causal connection between acts prohibited and danger apprehended not applicable to criminal anarchy — words "by any unlawful means," as used in Penal Law, sections 160 and 161, construed — criminal intent — evasion of statute by claiming use of existing government — evidence — argument of counsel — limitation on argument of defendant — instructions — conspiracy in violation of Penal Law, sections 530 and 532.

The owner and publisher of *The Revolutionary Age*, a paper devoted to the international communist struggle, who published a manifesto advocating the overthrow of government, State and national, not by constitutional means, but by revolution brought about by mass strike, which must of necessity involve violence, and further advocating a temporary dictatorship after which a government, only of production, shall exist which shall be followed by a nebulous theory of government by the proletariat, was properly convicted of criminal anarchy under sections 160-166 of the Penal Law.

It was entirely competent for the Legislature to make it a crime to advocate within this State the overthrow of the government of the United States or of this or any sister State by any means or method other than constitutional means or methods.

Sections 160-166 of the Penal Law, relating to criminal anarchy, do not offend against the guaranty of personal liberty under section 1 of the Fourteenth Amendment to the Federal Constitution, or due process of law guaranteed by article 1, section 6, and freedom of speech, etc., guaranteed by article 1, section 8, of the State Constitution, the latter section making the speaker or writer responsible for the abuse of the right given, since under such provision a citizen not only becomes responsible to any one injured by the abuse of this right but, consistently with these constitutional provisions and with the Fourteenth Amendment to the Federal Constitution, he may also be made answerable to the State criminally therefor.

The Constitution of the United States places no restraint on the power of the Legislature to punish the publication of matter which is injurious to society according to the standard of the common law; neither does it deprive the State of the primary right of self preservation, nor does it sanction unbridled license or authorize the publication of articles prompting

the commission of murder or the overthrow of the government by force.

So zealously do the courts uphold the constitutional provision relating to freedom of speech and of the press, and to personal liberty, that they construe legislation designed to prevent the abuse of those rights so as to prohibit only what is essential to prevent the abuse of those rights at which the statutes are aimed.

On a charge of criminal anarchy under the Penal Law, the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended, does not exist where the articles written are not a discussion of ideas or theories, but advocate a doctrine deliberately determined upon and planned for militantly disseminating propaganda to the effect that it is the duty and necessity of the proletariat to organize and, by mass strike, to stop the wheels of the government, to overthrow the government itself, to expropriate and nationalize public and private property and to administer it through a proletariat dictatorship, in some manner not very definitely disclosed, by and for the entire proletariat.

Therefore, in so far as it is competent for the Legislature to enact laws to prevent the overthrow of the government by unauthorized means, the initial and every other act knowingly committed for the accomplishment of that purpose may be forbidden and declared to be a crime.

The words "by any unlawful means," as used in sections 160 and 161 of the Penal Law, are not limited or restricted by the preceding provisions, and under the rule *noscitur a sociis* or the rule *ejusdem generis* are not to be construed as limited to unlawful means already known or of a like nature to those therein specified, but should be construed to extend to cover the advocacy of any new scheme that might be devised for overthrowing or overturning the government in an unauthorized manner.

Such words need not be construed as limiting the provisions of the statute to the advocacy of the overthrow of the government by the commission of a crime, but may be held to have been used in the sense of unauthorized by law.

However, as the statute is quite general and makes the advocacy of criminal anarchy a crime, without regard to criminal intent, it is essential that the forbidden doctrine be knowingly advocated with a view to the accomplishment of the forbidden purpose.

One advocating the doctrines of Communist Socialism cannot evade sections 160-166 of the Penal Law, defining and punishing criminal anarchy, on the ground that by such doctrine it is intended to utilize the existing government temporarily while organizing the proletariat for mass strike, and then establish a proletarian dictatorship for a period after the overthrow of the government, and after that a government of production only, while anarchy pure and simple advocates the destruction of all governments.

On a prosecution for criminal anarchy based on the publication of the aforesaid manifesto, held, that evidence by a member of the bar of a foreign city showing the nature and effect of a mass strike in said city to which the manifesto referred was competent and not prejudicial to the defendant;

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That evidence as to the circumstances under which the articles forming the basis of the prosecution were prepared, published and circulated was admissible in aid of the construction of ambiguous provisions therein; That although undue persistence by the prosecuting attorney in offering evidence after like evidence had been excluded was subject to criticism, it did not substantially prejudice the defendant;

That the argument of the assistant district attorney was not prejudicial to the defendant;

That the defendant was properly precluded in his argument to the jury from making statements of fact not in evidence, under the guise of explaining the manifesto;

That the instructions and refusals to charge by the trial court were not prejudicial to the defendant;

That the jury were warranted in finding that the defendant advocated the overthrow of the government by acts which would constitute a conspiracy in violation of sections 580 and 582 of the Penal Law.

APPEAL by the defendant, Benjamin Gitlow, from a judgment of the Supreme Court, rendered on the 5th day of February, 1920, convicting him of the crime of criminal anarchy, and also from orders denying defendant's motions to set aside the verdict and in arrest of judgment.

The appellant and three others were jointly indicted on three counts on the 26th day of November, 1919, by a grand jury, duly impaneled at an Extraordinary Trial Term of the Supreme Court duly convened by the Governor. The first count charges that on the 5th day of July, 1919, defendants feloniously advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means by certain writings then and there procured, prepared, composed, circulated and distributed by the defendants and caused to be circulated and distributed by them among divers people in the county of New York, which writings are set forth in the indictment and consist of "The Left Wing Manifesto." The manifesto was published in the issue of July 5, 1919, of *The Revolutionary Age*, a weekly publication devoted to the international Communist struggle. The second count charges the defendant with having committed the crime by feloniously printing, publishing, editing, issuing and knowingly circulating, selling, distributing and publicly displaying and causing and procuring to be printed, published, edited, issued and knowingly circulated, sold, distributed and displayed the said issue of

The Revolutionary Age containing certain writings advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means, and charges that the writings are the same as those set forth in the first count. The third count charges that the defendants were evil-disposed and pernicious persons and of most wicked and turbulent dispositions and unlawfully, wickedly and maliciously intending and contriving to disturb the public peace and to excite discontent and disaffection and to excite the good citizens of the State to hatred and contempt of the government and the Constitution of this State, and to solicit, incite, encourage, persuade and procure divers persons to commit acts of violence upon the persons and property of divers of the good citizens aforesaid and to raise and make insurrections, riots, routs, unlawful assemblies and breaches of the peace within the State, and to obstruct the laws and government thereof and to oppose and prevent their due execution, and to procure and obtain arms and ammunition for the more effectual carrying into effect their said most wicked and unlawful intentions and contrivances, on or about said 5th of July, 1919, in the county of New York, by certain writings by the defendants then and there distributed among and displayed to and caused to be distributed among and displayed to the said divers persons, which writings are the same as those set forth in the first count and which writings did unlawfully, willfully and wrongfully solicit and encourage and attempt and endeavor to incite, persuade and procure the said persons to commit such acts of violence upon the persons and property of the good citizens aforesaid, and to raise and make insurrections, riots, routs and unlawful assemblies and breaches of the peace within the State, and to obstruct the laws and government thereof and to oppose and prevent their due execution, and to procure and obtain arms and ammunition wherewith and whereby to execute and consummate their said most wicked and unlawful purposes, to the serious danger of the public peace of the State and open outrage of the public decency thereof. The third count was withdrawn on the trial and a general verdict of guilty was rendered on the other two counts.

Appellant was tried separately. At the commencement

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of the trial and before any evidence was taken, appellant through his counsel admitted full responsibility under sections 160 and 161 of the Penal Law for the publication and circulation of the manifesto as charged in the indictment. The manifesto set forth in the indictment was shown to have been published in the issue of *The Revolutionary Age* of July 5, 1919.

Swinburne Hale of counsel [*Walter Nelles* and *Murray C. Bernays* with him on the brief; *Charles Recht*, attorney], for the appellant.

John Caldwell Myers, *Deputy Assistant District Attorney*, of counsel [*Robert S. Johnstone* and *Alexander I. Rorke*, *Assistant District Attorneys*, with him on the brief; *Edward Swann*, *District Attorney*], for the respondent.

LAUGHLIN, J.:

The manifesto condemns the Socialist party and moderate Socialism for confining their advocacy of the overthrow of government to constitutional amendments brought about by the exercise of the elective franchise, and it repudiates that method as wholly inadequate to accomplish the purposes of the Left Wing and asserts that they can only be accomplished by a revolution brought about by a mass strike of the proletariat. It does not definitely define who constitute the proletariat but it evidently means those of the working classes who have no property, for it states, in effect, that the concentration of industry and social developments generally "conservatized the skilled workers" and "developed the proletariat of unskilled laborers massed in the basic industries," and that this proletariat, "expropriated of all property" and denied access to the American Federation of Labor Unions, required a labor movement of its own, which became a revolutionary industrial unionism, which "was a recognition of the fact that extra-parliamentary action was necessary to accomplish the revolution, that the political state should be destroyed and a new proletarian state of the organized producers constructed in order to realize socialism." It further states that the Socialist party repudiated the form of industrial unionism and "still more emphatically repudiated its revolutionary political implications, clinging to petty bourgeois

parliamentarism and reform;" that the dominant Socialism in the Socialist party united with the aristocracy of labor and the middle class and necessarily developed all the evils of the dominant Socialism of Europe and abandoned the "immediate revolutionary task of reconstructing unionism, on the basis of which alone a militant mass Socialism could emerge," and stultified "working class political action," by limiting such action "to elections and participation in legislative reform activity;" that the effect of this was to draw "more and more proletarian masses in the party, who required simply the opportunity to initiate a revolutionary proletarian policy," and that the war and the proletarian revolution in Russia provided the opportunity; that under the impulse of its membership, the Socialist party adopted a militant declaration against the war but its officials sabotaged this declaration and adopted a policy of "petty, bourgeois pacifism," and the bureaucracy of the party united with the bourgeois People's Council, which accepted the Wilson peace and betrayed those who opposed the war. It then condemns those in charge of the Socialist party for their reactionary policy in repudiating the policy of the Russian and German Communists and "refusing affiliation with the Communist International of Revolutionary Socialism," and states, in effect, that owing to the aggrandizement of "American Capitalism" by the war and its preparation to meet the crisis in the days to come, the immediate task of the Left Wing is modified but its general character is not altered, and that this is the moment of "revolutionary struggle" but "not the moment of revolution" because "American capitalism" is developing a brutal campaign of terrorism against the militant proletariat, and that these conditions "will necessarily produce proletarian action against capitalism" and that "strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg." The article then denounces the Socialist party and labor unions for favoring relief to the working classes only through lawful constitutional methods and states that there is a tendency on the part of workers "to initiate mass strikes," and that such strikes will be the determining

feature of proletarian action and they must be used to broaden the strike and "to make it general and militant," first using it for political objectives, finally developing "the mass political strike against Capitalism and the State." It next advises "the militant mass movements" in the American Federation of Labor "to split the old unions" and to break their power, and the organization of the "mass of the unorganized industrial proletariat," thereby "developing reserves for the ultimate conquest of power." It then states that a class struggle of a political nature is first to be waged for "immediate concessions" and the final conquering of power "by organizing the industrial government of the working classes," but that "the direct objective is the conquest by the proletariat of the power of the State," and that this is to be done not by capturing "the bourgeois parliamentary State" but by conquering and destroying it, and, therefore, "Revolutionary Socialism" repudiates the policy of introducing Socialism by legislative measures on the basis of the existing State. It also states that it is necessary for the proletariat to "expropriate all these by the conquest of the power of the State" all the political power, the army, police, industry and the press, "before it can begin the task of introducing Socialism," because as long as the bourgeois State exists "the capitalist class can baffle the will of the proletariat," and that "Revolutionary Socialism" proposes to conquer the power of the State "by class action of the proletariat," but that parliamentary action is necessary "in the process of developing the final action," and that the conquest of the power of the State "is an extra-parliamentary act" and will be accomplished not by "legislative representatives of the proletariat but by *the mass power of the proletariat in action*," and that the "supreme power of the proletariat inheres in the *political mass strike*." It further states that it is necessary to organize a new State in the form of "Communist Socialism — the government of the producers" in which "the proletariat as a class alone counts" and which is "based directly upon the industrial, organized producers, upon the industrial unions or Soviets, or a combination of both." The article points out that both anarchists and revolutionary Socialists intend to abolish the State, but that the anarchists in eagerness so to do fail to

realize that the State is necessary "in the transition period," and that the revolutionary Socialists intend to conquer the State by revolution starting with strikes of protest, developing into "mass political strikes and then into revolutionary mass action" and the "annihilation" of the State and the introduction of "the transition proletarian State functioning as a revolutionary dictatorship," which is necessary "to coerce and suppress the bourgeois," and that during the period of such coercion and suppression the proletarian dictatorship represents the proletariat as the ruling class "which is now supreme," and the full conditions of Communist Socialism will be developed and when all industries are nationalized, a new government is developed, "which is no longer government in the old sense," for it "concerns itself with the management of production and not with the government of persons," and that "out of workers' control of industry, introduced by the proletariat dictatorship, there develops the complete structure of Communist Socialism — industrial self-government of the communistically organized producers," and the bourgeois having been completely expropriated "economically and politically," the dictatorship ends and in its place comes "the full and free social and individual autonomy of the Communist order." The manifesto closes by stating that "the organ of the international revolutionary proletariat" is the "Communist International, issuing directly out of the proletarian revolution in action and in process of development" which wages war "equally against the dominant moderate Socialism and Imperialism" and "issues its challenge to the conscious, virile elements of the proletariat, calling them to the final struggle against capitalism," and "issues its call to the subject peoples of the world," and that their revolt is "a necessary phase of the world struggle against capitalist Imperialism," and that, therefore, it "offers an organization and a policy that may unify all the revolutionary forces of the world for the conquest of power and for Socialism," and that although "the revolutionary epoch of the final struggle may" last "for years and tens of years" the Communist International "offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the

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conquest of power," and that the proletariat of the world has been called "to the final struggle" by the Communist International. The Left Wing program, published in the same issue of *The Revolutionary Age*, outlines the preliminary steps for organization and co-operation leading to the final mass strike; and the "Communist Program," also published therein, to the same effect as the Left Wing manifesto but in some respects broader and bolder, is accepted and summarized. The manifesto advocates the doctrine that the present machinery of our government, which it is claimed is capitalistic, notwithstanding the fact that the majority rule through universal suffrage and no man's vote or voice in the government counts for more than that of another, should be overthrown and replaced by a government exclusively by the working classes and applicable to production only and on the Russian Soviet order. The churches, schools, colleges and other educational institutions are to be confiscated; but we are not informed concerning the use, if any, to which they are to be put. The doctrine advocated is, that during the reign of the proletarian dictatorship, during which it is admitted that it will be necessary to use force in conquering the bourgeois and expropriating all property, mankind will be so changed that the people will no longer require to be governed. No precedent is pointed to tending to justify these expectations for the realization of this illusory Utopia, under which there shall be only such government as may be had through "Workers, councils and similar organizations." But the proletarian dictatorship as it exists in Russia is referred to with approval as the *first* great victory and as illustrative of the transition period. The history of the world would seem to indicate that if these expectations are to be realized, there must necessarily be a very prolonged transition period of the proletarian dictatorship, for the overthrow of governments resulting in a proletarian dictatorship is to be brought about by teaching class hatred and revenge. Russia is proudly pointed to as an example of a proletarian dictatorship. The current reports of conditions there show what might be expected from such doctrines, and according to those reports the most barbaric punishment, torture, cruelty and suffering are inflicted upon the bourgeois including all members of

labor unions and the peasantry, and those who do not submit to the proletarian dictatorship are either starved to death or shot, and the survivors are evidently being disciplined by starvation, torture and imprisonment, to the point that they will live in harmony without being governed by the State. Those advocating this doctrine are unwilling to await the practical working of their theories in Russia; and it is fairly to be inferred from some of the statements in the manifesto that their reasons for this are fear that, owing to the fact that Russia is largely an agricultural country, the scheme may not be successful if confined to that country and, therefore, they deem it necessary at once to make the revolutionary struggle world wide, deeming that greater headway may be made in industrial centers where the proletariat greatly outnumbers the bourgeois. Hence it is that we find these doctrines principally advocated by those who come from Russia and bordering countries and their descendants, as is the appellant.

It is perfectly plain that the plan and purpose advocated by the appellant and those associated with him in this movement contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, as to which in view of the recent decision of the Supreme Court of the United States sustaining the Eighteenth Amendment to the Federal Constitution (*Rhode Island v. Palmer*, 253 U. S. 350) there seems to be little, if any, limitation, but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. They do not announce in advance how the dictator is to be chosen or just what kind of a government they expect ultimately to have; but they make it quite plain that the property of the States

and nation shall be taken over, and that every individual who has any property shall not only be deprived of it but also be deprived of any voice in the affairs of the State, such as they may be, under a government which is not to govern the people but only production. They do not expressly advocate the use of weapons or physical force in accomplishing these results; but they are chargeable with knowledge that their aims and ends cannot be accomplished without force, violence and bloodshed, and, therefore, it is reasonable to construe what they advocate as intending the use of all means essential to the success of their program.

After the assassination of President McKinley by an anarchist on the 6th of September, 1901, it was deemed that our laws were inadequate for the protection of organized government, and it appears by Senate Document No. 26 of the 125th Session in 1902 that a committee of the Senate reported for enactment certain statutes creating and defining the crime of criminal anarchy, which were enacted as sections 468-a to 468-e, inclusive of the Penal Code by chapter 371 of the Laws of 1902. In 1909 by the Consolidated Laws (Chap. 40; Laws of 1909, chap. 88), these provisions together with sections 461 and 469 of the Penal Code became sections 160 to 166, inclusive, of the Penal Law. The provisions of sections 160 and 161, with which only we are now concerned, are as follows:

" § 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

" § 161. Advocacy of criminal anarchy. Any person who:

" 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

" 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, docu-

ment, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

" 3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any State or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

" 4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine,

" Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both. "

Counsel for the appellant contends that these provisions should be so construed as to limit their application to the then recognized doctrine of anarchists for the destruction of all government by assassination and force and thus to end all government, and that the conviction of the appellant thereunder cannot be sustained for the reason that it was not shown that he advocated the destruction of all government by assassination and force, for although he has clearly advocated the overthrow and destruction of all existing governments, it is claimed that the doctrine he advocated contemplates the formation of a government, upon such overthrow and destruction, by a proletariat dictatorship and ultimately by the proletariat. In support of this contention, certain parts of the report of the committee reporting the draft of the laws are quoted as follows:

" The assassination of the late President McKinley by an anarchist who avowedly had no personal grievance against his victim, aroused the people of the nation to the recognition of the fact which thoughtful observers had already appreciated some time before, namely, that immigration of recent years had made the United States the abiding place of numbers of foreigners who, without understanding of our institutions, had brought with them views and prejudices formerly unknown

in our country, and doctrines which, if put into effect, would subvert not merely our or any particular form of government, but organized government everywhere. * * *

"It is not a particular crime—the murder or attempt at murder of any particular individual—which is to be prevented by additional penal legislation or for which additional punishment is to be provided, but rather the prevention of the spreading of doctrines hostile to the safety of our government and of all government, which inevitably tend to lead those who profess them to commit crimes or at least prepare them mentally for their commission. This problem—of reaching those who profess and teach the doctrines of anarchy, without themselves attempting or committing or inciting others to attempt or commit any particular crime—is a difficult one. All will agree, however, that anarchy, by which we mean the doctrine that organized government, of whatever nature whether republican or monarchical, should be overthrown by force, is a criminal doctrine, the teaching and spreading of which should be prevented by penal legislation. * * *

"Organized government must be maintained. To attack it, to preach the doctrine that it should be overthrown, is not the right of any one. * * * When it ceases, every individual is the prey of his fellows and will have no rights at all except those he can maintain by force."

In order properly to construe these provisions of the Penal Law, it is advisable, I think, to consider first what authority the Legislature had to enact laws designed to maintain existing government against overthrow and destruction by forbidding the advocacy within this State of their overthrow and destruction. I am of opinion that it was entirely competent for the Legislature to make it a crime to advocate within this State the overthrow of the government of the United States or of this or any sister State by any means or method other than constitutional means or methods. It is not necessary to decide whether the interests of the several States in the maintenance of other civilized governments is such that it is competent for the Legislature to prohibit the advocacy within the State of the overthrow or destruction of

any other government by any means not authorized for the change or overthrow of such governments, for the doctrines plainly advocate the overthrow of all existing government, and the conviction of the appellant rests on the advocacy by him of the overthrow of our own government, and every State is interested in the preservation of our National and State governments, and it is, therefore, competent for a State under its police power to enact laws for the protection thereof. (*State v. Gilbert*, 141 Minn. 263; *affd.*, *sub nom. Gilbert v. Minnesota*, 254 U. S. 325.) Counsel for the appellant contends that these provisions of the Penal Law, unless confined to prohibiting the advocacy of doctrines of anarchy in its strict sense, would be unconstitutional as constituting an abridgment of personal liberty guaranteed by section 1 of the Fourteenth Amendment to the Federal Constitution, and of the freedom of speech and of writing and publishing one's sentiments and the freedom of the press, preserved by article 1, section 8, of the State Constitution, and he also contends that the enactment of these provisions does not constitute due process of law and, therefore, is in violation of section 6 of article 1 of the State Constitution and of section 1 of the Fourteenth Amendment to the Federal Constitution. Manifestly, the argument based on lack of due process needs no extended consideration for he has had and is having due process of law which entitles him to a hearing and determination by a court of competent jurisdiction. Section 8 of article 1 of the State Constitution provides as follows: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Under the provisions imposing a responsibility upon the citizen for the abuse of the right freely to speak, write or publish his sentiments on all subjects, the citizen not only becomes responsible to any one injured by the abuse of this right but, consistently with these constitutional provisions and with section 1 of the Fourteenth Amendment to the Federal Constitution, he may also be made answerable to the State criminally therefor. (*Gilbert v. Minnesota*, *supra*; *People v. Most*, 171 N. Y. 423; *Robertson v. Baldwin*, 165 U. S. 275; *Schenck v. United States*, 249 *id.* 47; *Frohwerk v. United States*, *Id.* 204; *State v. Moilen*, 140 Minn.

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112; 167 N. W. Rep. 345; *State v. Fox*, 71 Wash. 185; *affd.*, *sub nom. Fox v. Washington*, 236 U. S. 273; *Patterson v. Colorado*, 205 id. 454; *Gompers v. Bucks Stove & Range Co.*, 221 id. 418, 439; *Goldman v. United States*, 245 id. 474; *State v. Quinlan*, 86 N. J. Law, 120; *State v. Boyd*, Id. 75; *affd.*, 87 id. 328; *Turner v. Williams*, 194 U. S. 279.) In *Turner v. Williams* (*supra*) the court, in sustaining the constitutionality of an act of Congress (32 U. S. Stat. at Large, 1213, chap. 1012; Id. 1214, § 2) providing for the exclusion of aliens "who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government," announced a general doctrine as follows: "As long as human governments endure they cannot be denied the power of self-preservation." In *Schenck v. United States* (*supra*) a conviction was sustained under the Espionage Act for conspiracy to circulate among men called and accepted for military service, a circular tending to and intended to influence them to obstruct the draft, without proof that it had such effect. In *Gilbert v. Minnesota* (*supra*) a similar conviction under a broader State statute was sustained, and it was held that the interest of the State in preserving the Union and the several States warranted the enactment of the statute. In *State v. Moilen* (*supra*) a statute declaring and defining the crime of criminal syndicalism, and prohibiting the advocacy of sabotage or other methods of terrorism as a means of accomplishing industrial or political aims, was sustained as constitutional. In *State v. Fox* (*supra*) a statute (Rem. & Bal. Code, § 2564) making it a crime to edit or publish an article advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of a crime, breach of the peace or act of violence, "or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice," was sustained as not in violation of the constitutional right of freedom of the press. In *People v. Most* (*supra*) the court in sustaining the conviction of the defendant for publishing an article calculated to incite a breach of the peace for violation of section 675 of the Penal Code, making it a misdemeanor for any person willfully and wrongfully to commit any act seriously endangering the public peace, said: "Mr. Justice STORY defined the phrase [liberty of the press] to

mean 'that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government.' (Story's Commentaries on the Constitution, § 1874.) The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section [of the State Constitution] from which the above quotation is taken expressly sanctions criminal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles, as the authorities uniformly hold. (*People v. Ruggles*, 8 Johns. 290, 297; *People v. Muller*, 96 N. Y. 408; *In re Rapier*, 143 U. S. 110.) It places no restraint upon the power of the Legislature to punish the publication of matter which is injurious to society according to the standard of the common law. *It does not deprive the State of the primary right of self-preservation.* It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the Constitution of any State, appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government. (Story on the Const. § 1878; Cooley on Constitutional Limitations, 518; Ordronaux on Constitutional Legislation, 237; Tiedeman on Police Powers, § 81.)"

In an excellent article written by Henry W. Bikle on the "Jurisdiction of the United States over Seditious Libel," published in 50 (O. S.) American Law Register, 1, he quotes from Folkard's "Slander and Libel" (Chap. XXXIII, p. 368) as follows: "It is necessarily incident to every permanent form or system of government to make provision, not merely for its continuance, but for its secure continuance. To that security the confidence and esteem of the people is indispensable; and, therefore, it is essential to prohibit malicious

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attempts to produce the mischiefs of political revolution, by rendering the established constitution odious to the society which has adopted it. The State and Constitution being the common inheritance, every attack, made upon them, which affects their permanence and security, is in a degree an attack upon every individual and concerns the rights of all. It is, therefore, a maxim of the law of England, flowing by natural consequence and easy deduction from the great principle of self-defence, to consider as libels or misdemeanors every species of attack by writing or speaking, the object of which is wantonly to defame that economy, order and constitution of things which make up the general system of the law and government of the country."

Mr. Bikle summarizes his views on page 24 as follows: "The form of government of the United States contains within itself the means of changing either its policy or its structure by constitutional measures. The advocate of such changes who urges the exercise of constitutional rights for dislodging the party in power or for amending the Constitution can with perfect propriety, we think, claim that he is within the protection of the [first] constitutional amendment. It is when he passes this line and urges illegal and unconstitutional measures to replace the governing party or to overthrow the form of government, that there arises an abuse of that liberty of speech and of the press, which is intended to be secured to the people."

Tiedeman on the "Limitations of Police Power," in section 81 at page 192, says: "So, also, it is not to be inferred from the prohibition of a censorship of the press, that the press can without liability for its wrongful use, make use of the constitutional privilege for the purpose of inciting the people to the commission of crime against the public. The newspapers of anarchists and nihilists cannot be subjected to a censorship, or be absolutely suppressed; but if the proprietors should in their columns publish inflammatory appeals to the passion of discontents, and urge them to the commission of crimes against the public or against the individual, they may very properly be punished, and without doubt, the right to the continued publication may be forfeited as a punishment for the crime."

So zealously do the courts uphold the constitutional provisions relating to the freedom of speech and of the press and to personal liberty, that they construe legislation designed to prevent the abuse of those rights so as to prohibit only what is essential to prevent the abuse at which the statutes are aimed (*State v. Fox, supra*); and the courts in construing such statutes have in some instances said that the danger to be apprehended from a doctrine, the advocacy of which is lawfully and constitutionally forbidden, must be present or immediate (*Schenck v. United States, supra*; *Masses Pub. Co. v. Patten*, 244 Fed. Rep. 535; *revd.*, 246 id. 24; *Colyer v. Skeffington*, 265 id. 17); and in other decisions it is stated that a question of proximity and degree is involved, and that the "natural tendency and reasonably probable" effect of the words used must be to accomplish the evil which it is the purpose of the statute to guard against. (*Debs v. United States*, 249 U. S. 211; *Commonwealth v. Peaslee*, 177 Mass. 267; *Abrams v. United States*, 250 U. S. 616, dissenting opinion by Mr. Justice HOLMES at p. 627; *Schaefer v. United States*, 251 id. 466; *Pierce v. United States*, 252 id. 239.) I am of opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here. The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown, and all public and private property expropriated and nationalized and administered for a time through a proletarian dictatorship and thereafter, in some manner not very definitely disclosed, administered by and for the entire proletariat. I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and intended to overthrow government in this manner, until it can be shown that there is a present or immediate danger that it will be successful, for such legislation

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would afford no adequate protection against the apprehended danger, because it is evident that the organization of the proletariat as advised and urged, and the spread of the pernicious doctrine, are to be effected in the main secretly; for we are not informed who is to determine when the time for massed strikes will be ripe or who is to call them, and it is evident that a law so limited might only become effective simultaneously with the overthrow of government, when there would be neither prosecuting officers nor courts for the prosecution and punishment of the crimes. In so far, therefore, as it is competent for the Legislature to enact laws to prevent the overthrow of government by unauthorized means, I am of opinion that the initial and every other act knowingly committed for the accomplishment of that purpose may be forbidden and declared to be a crime. We must assume that the Legislature deemed that, unless the advocacy of such a doctrine was prohibited, there was danger that sooner or later the government might be overthrown thereby. That, I think, was sufficient to warrant the enactment of the statute. I know of no right on the part of the aliens who are members of the Left Wing and here merely by sufferance of our government, to advocate the overthrow of our constitutional form of government by unlawful means; and surely naturalized citizens who have sworn to uphold the Constitution have no right to advocate its overthrow otherwise than through the ballot box and as provided for its amendment, nor have native-born citizens of alien parentage, such as the appellant is, or any other citizen, such right, and they should not be heard to invoke the protection of the Constitution against their prosecution for acts, deliberately performed, calculated and intended to overthrow and nullify it by unauthorized means. (See *State v. Gilbert, supra.*) The doctrines advocated are not harmless. They are a menace, and it behooves Americans to be on their guard to meet and combat the movement, which, if permitted to progress as contemplated, may undermine and endanger our cherished institutions of liberty and equality. But if immigration is properly supervised and restricted and the people become aroused to the danger to be apprehended from the propaganda of class prejudice and hatred — by a very small minority mostly of foreign birth,

which has for its object not only the overthrow of government but the destruction of civilization and all the innumerable benefits it has brought to mankind — there can be no doubt but that the God-fearing, liberty-loving, Americans both in the urban and rural communities, who appreciate the equal opportunities for all for bettering their status and for advancement afforded by our constitutional form of government, under which the majority rule, and have made and are making sacrifices to improve their condition and that of their families, and to accumulate property for themselves and those who come after them, will see to it that these pernicious doctrines are not permitted to take root in America. Since it is competent for the Legislature to enact laws for the preservation of the State and Nation, the laws required for that purpose rest in the legislative discretion, and if they are reasonably adapted to that end and are based on danger reasonably to be apprehended, even though not present or immediate, they may not be annulled by the courts either on the theory that it would be wiser to leave it to the people to meet the pernicious doctrines by argument, or that they unnecessarily restrict the freedom of speech or of the press or of personal liberty. The Legislature within its authority has spoken for the People, and it is the duty of the courts to enforce the law.

§ The learned counsel for the appellant contends that the general words "or by any unlawful means," contained in sections 160 and 161 of the Penal Law, are limited and restricted by the preceding provisions and, under the rule *noscitur a sociis* or the rule *ejusdem generis*, are to be construed as limited to unlawful means of a like nature to those thereinbefore specified, and that, therefore, those sections relate only to the advocacy of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of an executive official, and like acts. I am unable to agree with that construction and am of opinion that each of the clauses is to be given separate effect. I think the Legislature specified the known acts and means then and theretofore advocated for the overthrowing and overturning of governments, and that it inserted the words "or by any unlawful means" to cover the advocacy of any new scheme that might be devised for overthrowing or overturning govern-

ment in an unauthorized manner; but if the Legislature did not then have in mind or foresee that such a scheme for overthrowing government as the appellant advocated might thereafter be devised and advocated, that would afford no obstacle to a construction of these statutes which forbids the advocacy of such a doctrine. (*United States v. Mosley*, 238 U. S. 383; *Louisville & Nashville R. R. Co. v. Layton*, 243 id. 617; *People v. Abeel*, 182 N. Y. 415; *People v. Hamilton*, 183 App. Div. 55, 62; *People ex rel. McClelland v. Roberts*, 148 N. Y. 360; *State ex rel. City of Minneapolis v. St. Paul, M. & M. R. Co.*, 98 Minn. 380; 25 R. C. L. 778.) That, I think, is the plain effect of the language employed, and it is a general rule of construction that the Legislature must have intended what it plainly and unequivocally did; and if the language employed is plain, it affords conclusive evidence of the intent of the Legislature. (*People v. Luhrs*, 195 N. Y. 377, 381; *Newell v. People*, 7 id. 9, 98; *People ex rel. Darling v. Warden of City Prison*, 154 App. Div. 413; *Tompkins v. Hunter*, 149 N. Y. 117, 122, 123; *McCluskey v. Cromwell*, 11 id. 593; *People ex rel. Smith v. Gilon*, 66 App. Div. 25; *Gibbons v. Ogden*, 9 Wheat. 1, 188; *Jackson v. Lewis*, 17 Johns. 475.) There would be some force in the contention of the appellant if the wording of the statute were "or by any other unlawful means," but it does not so provide. Statutes making it a crime for two or more persons to conspire to obstruct the administration of the law or the administration of justice, even where such acts by individuals were not declared to be unlawful, have frequently been sustained. (*Drew v. Thaw*, 235 U. S. 432, 438; *People ex rel. Childs v. Knott*, 187 App. Div. 604, 610, 611.) The words "unlawful means" as used in the statute need not be construed as limiting the provisions thereof to the advocacy of the overthrow of government by the commission of a crime, and may be held to have been used in the sense of unauthorized by law, in which sense those words are sometimes used in criminal statutes. (*MacDaniel v. United States*, 87 Fed. Rep. 324; *State v. Savant*, 115 La. 226. See, also, *Century Dictionary*, vol. 8, p. 6625.)

But if these statutory provisions required a construction that the doctrines advocated must in and of themselves be illegal, in the sense that they advocate the commission of a crime,

the scheme and program advocated by the appellant and others as shown by the manifesto and Left Wing program, if they do not as a matter of law require the construction that they advocate the overthrow of government by illegal means involving the commission of a crime, warranted a finding to that effect by the jury.

It will be observed that the statutes make the advocacy of the doctrine a crime, without regard to criminal intent. The doing of a lawfully prohibited act, in and of itself, without regard to intent, may constitute the crime (*People v. Schaeffer*, 41 Hun, 23); but the language of these statutes is quite general and, therefore, I think it is essential that the forbidden doctrine be knowingly advocated with a view to the accomplishment of the forbidden purpose. The guilt of the appellant could not be declared as a matter of law, but I think the court might have instructed the jury that the advocacy of the doctrine of these articles violated the provisions of the statutes. (*Horning v. District of Columbia*, 254 U. S. 135.) In the case at bar it was not denied that the appellant knowingly advocated the forbidden doctrine for the purpose of overthrowing government as therein advised. It was conceded that the defendant in part owned and controlled and was the business manager of *The Revolutionary Age*, and that he was a member of the National Council of the "Left Wing Section of the Socialist Party," and that he not only had knowledge of the publication of the manifesto but was responsible therefor and for its sale, circulation and distribution.

In arguing that the defendant by these articles has not advocated the use of force, his counsel says: "If the republic of Hayti has peaceably surrendered its government to the United States, we may have overthrown that government wrongfully, but we have not done it by force or violence or by unlawful means. So in the academically possible event of our peaceably surrendering our own republic to the government of a foreign power. And if a peaceable mass demonstration of all or a large part of the people of any country should prevail upon all the officers of government to cease functioning, and a new set of officials chosen under a new constitution thereafter functioned in fact, without opposition, there again there would have been an overthrow, not affirmatively lawful,

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perhaps, but *not* unlawful in its means." We are not now concerned with the action of our government in Hayti, and the verdict of the jury is an answer to this argument in so far as it implies that the appellant and those associated with him did no more than to advocate that the people of this State and country prepare themselves for a peaceable surrender of our republic to a foreign power, or to advocate that through a peaceable mass demonstration of the proletariat, all the officers of our State and National governments may be prevailed upon to cease functioning and that a new set of officers may be chosen under a new Constitution without the use or exertion of force or violence. The defendant and his fellow-socialists of the Left Wing knew perfectly well that such results could not be peaceably accomplished, and moreover they are not advocating a change in the Constitution or a new Constitution or government. They are plainly advocating the destruction of all existing government. The only practical difference between the doctrines advocated by them and the doctrine of anarchy pure and simple is, that they intend to utilize the existing government temporarily while organizing the proletariat for mass strike, and they intend a proletarian dictatorship for a period after the overthrow of the government, and after that a government of production only, which they call Communist Socialism. They cannot evade the statutes on this theory, for plainly the Legislature did not recognize the right to destroy all existing government provided the advocates of the doctrine by which this is to be accomplished contemplate setting up some other form of government, temporarily to be succeeded by another form of government, concerning which their doctrines are nebulous.

The appellant contends that he was prejudiced by testimony given by a member of the Winnipeg bar, called by the People, showing what the mass strike to which the manifesto referred with apparent approval was. That testimony tends to show that the strike stopped the organized government of the city and that a committee of the strikers took charge of and conducted the affairs of the city in their own way. It is said in behalf of the appellant that he may not have known precisely the form the strike took in Winnipeg or the action of the strikers, and that the reference thereto in the manifesto

may have been based on newspaper dispatches or inaccurate information with respect to the strike in Winnipeg. The article does not purport to show the source of the information of the author, but since it was written more than six weeks after the commencement of the strike, which afforded ample time to obtain complete information with regard thereto, and there being no evidence to the contrary, the jury were justified in inferring that the author and the appellant had general knowledge of the conditions existing in Winnipeg, and that the action of the mass strike as there conducted was cited as showing the manner in which the appellant and his fellow-members of the Left Wing were advocating the overthrow of government. The testimony was not extended to any acts on the part of the strikers beyond those plainly advocated by the manifesto with respect to mass strikes as the method by which the proletariat expects to overthrow government and take charge thereof through a proletarian dictatorship.

The court in instructing the jury drew attention to that part of the manifesto and to the evidence with respect to the Winnipeg strike, and then said, " You have heard the evidence of what did occur at Winnipeg. Was that a violation of law? " Counsel for the appellant excepted generally to the language of the court in instructing the jury on mass action and general strikes, and especially in calling attention " to what happened in Winnipeg with reference to its bearing on mass action and general strikes." Appellant now complains of the action of the court in leaving it to the jury to say whether what occurred in Winnipeg was lawful, but no specific exception was taken to that being left to the jury. The court merely left that evidence to the jury as illustrative of what the appellant and others were advocating. There was no evidence with respect to the laws of Canada, and it is perfectly plain that the court meant and the jury must have understood, that they were to determine whether such a mass strike if it occurred here would have been lawful. It is obvious that it would be unlawful for the proletariat, by means of a mass strike, to oust the regularly constituted officials of a municipality here from their official positions and to take over and usurp their functions and administer the affairs of the municipality through a proletarian

dictatorship or committee, for that would be in violation of the Constitution and of the laws of the State. Not only, therefore, was the evidence not prejudicial to the appellant, but I think it was entirely competent.

The appellant also contends that the court erred in receiving improper testimony and in permitting the persistent use of improper methods by the assistant district attorney, and took part in exaggerating trivialities and in opening leads into extraneous matters, to the prejudice of the defendant. The evidence to which this criticism is addressed relates to the place of and the circumstances attending the printing and publication of the articles, the methods of conducting the business and distributing the articles, the constitution of the Socialist party and appellant's connection with it and with the schism therein by which the Left Wing, which he joined, was formed, and the fact that citizenship was not a requisite to membership therein, and that many of its members were aliens. Counsel for the appellant is right in contending that since the defendant admitted responsibility for the publication and circulation of the articles, including responsibility for the doctrines therein advocated, proof of the other facts to which he objected was not strictly required, for I am of opinion that the violation of the statutes was sufficiently shown by those provisions of the articles which are free from ambiguity. In some respects, however, the doctrines advocated in the articles are vague and indefinite, and, therefore, the circumstances under which they were prepared, published and circulated, and the purposes of the Socialist party to which appellant and his fellow-members of the Left Wing had been members, and from which they had seceded on the ground that the doctrines advocated by that party were not sufficiently radical, were admissible in aid of the construction of the manifesto. The objections having been overruled, most of the facts thus sought to be proved were admitted, and with respect to those not so admitted it is evident that there was no doubt concerning them, for they stand uncontroverted. The only effect given to these facts was in shedding light on the construction of the manifesto, for the court in submitting the case to the jury made it perfectly clear that the guilt of the defendant was to be determined from the contents of the articles published,

and they were submitted to the jury by consent. I am, therefore, of opinion that the evidence was properly received. The conduct of the prosecuting attorney, of which complaint is made, was largely with respect to the admission of the evidence to which reference has been made; but it also relates to repeated attempts to prove acts in connection with the Winnipeg strike, which were excluded by the court. In respect to some of these matters, the criticism is well founded, for there was undue persistence in offering evidence after like evidence had been excluded; but we think no error was committed to the substantial prejudice of the defendant. Error is also predicated on the summing up by the assistant district attorney, but no complaint was made at the time and no objection was taken thereto and no ruling or instruction to the jury was asked thereon and, therefore, these matters are not presented for review. (*People v. Loose*, 199 N. Y. 505, 510; *People v. Pindar*, 210 id. 191, 196.) The appellant had been permitted to address the jury personally, and this was followed by a summation in his behalf by a very able and experienced counsel, whose argument extended to a very wide latitude. In answering these arguments, the assistant district attorney quite freely expressed his opinion with respect to the effect of and the consequences that would follow a mass strike and the overthrow of government thereby. If the appellant claimed prejudice in this respect, he should have objected at the time, so that the court might have ruled whether the manifesto, fairly construed, contemplated the acts which the People claimed it advised and advocated; and if the rulings were not satisfactory, he should have excepted, and the exception would have presented for review the correctness of the rulings and the point whether or not the defendant was prejudiced. (*People v. Loose*, *supra*; *People v. Pindar*, *supra*.) What is expected will ultimately follow the overthrow of government as advocated by the defendant and others is not made entirely clear by the manifesto. Whether such failure is owing to the fact that the advocates of the doctrine do not know themselves, or whether it has been deliberately concealed in an effort to avoid criminal responsibility, was a fair matter of comment by the representative of the People and for determination by the jury. It is equally clear that

the assistant district attorney was justified in arguing and the jury were justified in finding that, notwithstanding the fact that there is in these articles no express advocacy of force and violence in overthrowing government, the use of force and violence is plainly impliedly advocated, for no sane man could expect that, confronted with a mass strike, the constituted authorities of a municipality or state or nation would abandon their duties and surrender their authority to or that public or private property would be given up to a proletarian mob without the use of force or violence. Counsel for appellant contends, in effect, that the advocates of this doctrine honestly believed that when confronted with the mob in mass strike, owners whose property was theretofore under the protection of the government, whether such property consists of the plants and residences of the capitalists, or of the private property and residences of workmen in the cities, villages and towns, or of the farms in the country, will surrender it without the use of force and violence; but that is too incredible to require discussion. When people combine and advocate such doctrines, there must necessarily be great latitude for reading between the lines to determine what is implied in the doctrine, and they should be held responsible for advocating what they must know is involved in the doctrine and will be essential to the accomplishment of their purpose. That, in effect, is what the assistant district attorney argued, and he was clearly within his rights in so doing. Excepting in extreme cases where the evidence is insufficient to sustain a conviction, or there is grave doubt with respect thereto, which is not the case here, review on appeal should be confined to the exceptions.

The complaint as to the attitude of the court is largely with respect to remarks made during the introduction of the evidence, to which reference has been made, and with respect thereto and ruling thereon and suggestions by which hearsay evidence concerning the Winnipeg strike was excluded. With reference to these matters we find no ground for just criticism for it was entirely proper that the trial court should make suggestions with a view to receiving the evidence offered so far as it was deemed competent, and to eliminating that which was deemed incompetent.

It is further contended that the court erred in suggesting the existence of a conspiracy. That is predicated on certain remarks made during the course of the trial to which no exception was taken. It is to be borne in mind that the appellant was indicted jointly with others, and while he admitted responsibility for the articles, he did not admit that he wrote them or that he had formally approved them. The remarks of the court were with respect to the evidence offered to show that the articles were formally approved by the Left Wing of the Socialist party of which he was a member, and that the appellant in publishing and circulating the articles was carrying into effect the action of his party. The only reference made by the court to a conspiracy was in sustaining an objection made by counsel for the appellant to a question as to whether one Larkin at the last session of the delegates of the Left Wing had led cheers for the socialist revolution. The court stated that the appellant was being tried for the language used in these articles, and asked how it could be material whether at some prior time he had united in cheers for the socialist revolution or whether one of his fellow-conspirators had led cheers for it. In this connection the court further said, "I say 'fellow conspirators,' because there is a committee here which published this paper," and added that all of the members of the committee might be considered as conspiring and uniting together for its publication. Counsel for appellant thereupon objected to the use of the word "conspiracy," as meaning more than "thus uniting," whereupon the court withdrew the remark in so far as it implied wrongdoing, and counsel for the defendant expressed satisfaction therewith and took no exception. Manifestly the defendant was not prejudiced by these remarks.

It is also claimed that the court erred in commenting on the defendant's failure to take the stand and in interfering with his address to the jury. The defendant was stating to the jury what he and his fellow-socialists of the Left Wing were informed the war was fought for, and what they understood was the effect of the peace treaty. The court interrupted on the ground that appellant was stating matters not shown to be facts. The appellant thereupon said that the manifesto touched upon those matters; and the court answered that he

might use the language of the manifesto but could not make a speech beyond such language. Counsel for appellant thereupon asserted that his client had a right to explain the meaning of the manifesto. That, however, he was not attempting to do. The court then, evidently assuming that the appellant and his counsel were insisting that the statement of facts he was making was an explanation of the manifesto, answered that he had no right to explain its meaning because he had not subjected himself to cross-examination, and an exception was taken by the defendant. It is quite evident that the court did not mean literally that the appellant was not at liberty to take up and discuss what was meant by any particular part of the manifesto, but merely that under the guise of explaining the meaning of the manifesto he was not to be permitted to make statements of fact not in evidence with respect to the reasons why the manifesto was promulgated. The court also precluded the appellant from illustrating his views by reference to conditions he claimed existed in Russia but which were not shown by the evidence. There was no error in these rulings.

Error is also predicated on the instructions of the court to the effect that the jury must take the law from the court and not from counsel, and that the criminal anarchy statutes were the law of the State, and that it was so established by the similar case of *People v. Most* (*supra*). The court was right in instructing the jury that the statutes were constitutional; and there was no error in stating to the jury that he deemed this view sustained by the decision cited.

It is further claimed that the court in instructing the jury gave too narrow a definition to the statutory crime. The court stated the statutory definition and that the jury must find beyond a reasonable doubt that there was an organized government in this State and country, and that these articles advocated the duty, necessity or propriety of overthrowing or overturning it. To this counsel for the appellant excepted, and he thereupon requested the court to charge, in effect, that the statute merely meant to prohibit the advocacy of a doctrine for the overthrow of all government, and that it did not forbid the advocacy of a change of control of the government from one class or group to another, even though such

change should be accompanied by drastic or complete changes in the form and policy of the government. That request was properly refused. It was not applicable to the facts. The doctrine advocated by the appellant is not for a change of control of the government, but is for the annihilation of existing governments in general. We are not now concerned with the question as to whether the appellant on these facts could be convicted under this statute for advocating the overthrow of a foreign government. It must be assumed that the conviction followed the charge, under which the appellant could only be convicted if he advocated in violation of these statutes the overthrow of our own State or National government. It is perfectly clear that the doctrines that he advocates are general with respect to all governments, but the jury did not have before them the forms of other governments or the lawful methods for a change thereof, and were given clearly to understand that they were dealing with the defendant for acts committed within the jurisdiction of this State and with respect to our State and National governments. A later request by counsel for appellant to charge, which was granted, shows that he claimed that the prohibitions in the statute are confined to violations of our laws.

It is further contended that the court erred in refusing to charge the appellant's fourth request, that "unlawful means includes only conduct of the same character as force and violence." The court before concluding the main charge took up the appellant's requests and charged some, and charged others in a modified form; but made no reference to the fourth. At the close of the charge the court gave the appellant an exception to the requests that had been refused. The court in the main charge instructed the jury that our Constitution provided lawful means for overthrowing the government, and that any means advocated, advised or taught for the overthrow of organized government, other than those recognized by law, are unlawful; and that under the law of this State the teaching of such a doctrine is a crime. The court, however, modified these instructions by charging the defendant's fifth request, which was that the statute only forbids the advocacy of the overthrow of government by "those means which now constitute criminal offences under the laws of this State," and

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that it does not include any means or action that the jury might disapprove of or might deem should be declared unlawful, but added that under the laws of this State it is unlawful to take private property without compensation or to conspire to injure the public health or trade or commerce. There was no exception to this modification. The defendant's fourth request placed too narrow a construction on the statute, and the instructions given were most favorable to the appellant.

Counsel for the defendant complains now of an additional charge with respect to larceny and conspiracy given in charging the fifth request, and of an observation made by the court expressing serious doubt in so charging the fifth request. It is claimed that the court thereby, in effect, placed upon the appellant the burden of establishing the legality of any unparliamentary or extra-constitutional means advocated by him. The court did not place any burden on the appellant, but merely left it to the jury to determine whether the doctrine advocated by him involves the overthrow of the government by force or violence or any unlawful means.

Complaint is also made of the charge with respect to criminal conspiracy and what strikes are lawful. The court charged that strikes in and of themselves are not violations of law, and that persons employed in any calling, trade or handicraft are by express provisions of law permitted to assemble and peaceably co-operate for the purpose of obtaining an advance in the rate of wages or compensation or of maintaining such rate, but that the statutes make it a misdemeanor for two or more persons to conspire to commit an act injurious to the public health, to the public morals, or to trade or commerce, or for the perversion or obstruction of justice or of the due administration of the law; and then left it to the jury to say whether the doctrines advocated by these articles were for the overthrow of the government by the acts of two or more persons in violation of those statutes. I am of the opinion that these instructions were proper and that the jury were warranted in finding that the appellant advocated the overthrow of the government by acts which would constitute a violation of our Conspiracy Law (Penal Law, §§ 580, 582). The court to some extent particularized with respect to the conspiracy statutes by leaving it to the jury to say whether the doctrines

advocated the taking of private property unlawfully, or the doing of acts injurious to trade or commerce, for the purpose of accomplishing the overthrow of the government. There was no exception taken with regard to this particularization or with respect to any of the matters so particularized. Counsel for the defendant cites section 580 of the Penal Law and *People v. Flack* (125 N. Y. 324); *National Protective Assn. v. Cumming* (170 id. 315); *Bossert v. Dhuy* (221 id. 342), and *Auburn Draying Co. v. Wardell* (227 id. 1), as holding that a criminal intent is an essential element of the crime of conspiracy, and says that the court did not leave any question of criminal intent to the jury. There was no request to have the jury instructed on this point, and no exception taken to the charge on the ground that it did not embrace that element. It is, therefore, too late now to complain of what might have been remedied had the attention of the court been drawn to the point.

It is also claimed that the court erred in reading to the jury extracts from the constitution of the Socialist party. That constitution was in evidence, and it appeared that at a convention of the party held in Madison Square Garden in June, 1919, a split occurred on which the militant socialists, including the appellant, who were unwilling to be contented with advocating the overthrow of government by parliamentary or constitutional methods, seceded and formed the Left Wing. The language of the manifesto and the Left Wing program is, as has been seen, to some extent vague and ambiguous. The defendant having been a member of the Socialist party and having advocated the secession and the formation of the Left Wing, the constitution with which he and his associates were dissatisfied was properly considered in determining the meaning of the Left Wing manifesto.

The appellant finally draws attention to other parts of the charge which he claims conveyed to the jury minor implications prejudicial to him. They relate, among other things, to instructions to the jury that the doctrines advocated by the appellant were to be determined by the consideration of the article as a whole, and not by particular parts to which his counsel had drawn attention, and to definitions of "proletariat," "bourgeois" and "capitalism." The court was

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right in charging that the jury should consider the entire manifesto in determining whether appellant advocated a doctrine prohibited by the statutes. The court quoted definitions from standard authorities and writings, and manifested a willingness to charge any definition desired by the appellant, but no request was made to supplement the definitions given or to charge otherwise.

It follows that the judgment of conviction should be affirmed.

CLARKE, P. J., SMITH, PAGE and MERRELL, JJ., concur.

Judgment and order affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of BASCO POLUCCI, Respondent, for Compensation under the Workmen's Compensation Law, v. EMERSON NORRIS Co., Employer, and GLOBE INDEMNITY COMPANY, Insurance Carrier, Appellants.

Third Department, March 9, 1921.

Workmen's Compensation Law — loss of fourth finger and loss of use of third finger — erroneous award under section 15 — authority of Industrial Commission to increase award to loss of one-third of hand in interest of justice, under section 74 — when payment of increased compensation should begin — informal procedure disapproved.

Where an employee met with an accident cutting off his fourth finger and badly crushing the bone of the third finger and an award was made under section 15 for the loss of the fourth finger and the loss of use of the third finger, and two years later application was made for compensation for the loss of one-third of a hand, the award was properly increased under authority of section 74, in the interest of justice, since the claimant should have received the increased award in the first instance.

The payment of the increase should commence at the termination and payment of the previous award.

Informal proceedings for the increase of an award disapproved.

APPEAL by the defendants, Emerson Norris Co. and another, from an award of the State Industrial Commission, entered in the New York office of the said Commission on the

4th day of June, 1920, and also from an order of said Commission entered in its New York office on the 4th day of August, 1920, denying the application of the defendants to reopen the case and affirming the award theretofore made.

Robert M. McCormick [*Joseph F. Murray* of counsel], for the appellants.

Charles D. Newton, Attorney-General [*E. C. Aiken*, Deputy Attorney-General, and *Bernard L. Shientag* of counsel to State Industrial Commission], for the respondents.

KILEY, J.:

Claimant is a pattern maker, and while so engaged in the plant of his employer at Tuckahoe, Westchester county, N. Y., on February 2, 1918, met with an accident cutting off his fourth finger and badly crushing the bone of the third finger. Employer and employee filed an agreement for compensation at fifteen dollars per week which was approved by the State Industrial Commission and an award made accordingly. The basis of this award was "twenty-five weeks for loss of use of third finger and fifteen weeks for loss of fourth finger; total, forty weeks, and case closed." This decision was made after a hearing had April 30, 1918. On June 1, 1920, more than two years after the previous award was made, and with no record evidence of how the Commission was again set in motion, a physician was called in and said the injury constituted the loss of one-third of the hand. Without delay, brushing aside argument or suggestion, a decision was then and there made, as follows: "Decision: Modify previous award to read: Eighty-one and one-third weeks at \$19.23 for loss of one-third of the hand." The first award was made under the provisions of section 15, subdivision 3, of the Workmen's Compensation Law (as amd. by Laws of 1917, chap. 705). The modified award was made under the same section and subdivision. The carrier objects that this cannot be done. The source of power in the Commission for such procedure is found in sections 22 and 74 of the Workmen's Compensation Law, viz., when conditions have changed, or in the interest of justice. It is conceded in this record that there is no change in conditions. Under the provisions of section 15 (*supra*) there is

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no question but what the claimant was entitled to the award last made. Under section 74 of the Workmen's Compensation Law I think the Commission could say that when a claimant has received less than the maximum he is entitled to, it is an injustice to him if he does not receive that amount. The reason given by the Commissioner presiding at the hearing when the last award was made was that "what they forgot to do is to give him part of the hand." While I do not like the informal procedure by which this result was reached, I think justice was done. Such conclusion is upheld in *Beckmann v. Oelerich & Son* (174 App. Div. 353) and *Kriegbaum v. Buffalo Wire Works Co., Inc.* (182 id. 448). The increase over fifteen dollars a week should commence at the termination and payment of the previous award (*Salotar v. Neuglass & Co.*, 228 N. Y. 508), and as so modified should be affirmed.

All concur.

Award modified as per memorandum, and as modified affirmed.

BENJAMIN WEINTRAUB, Respondent, v. GUSTAVE E. KRUSE,
Appellant.

Second Department, March 31, 1921.

Vendor and purchaser — specific performance — failure to prove description of premises to be conveyed by metes and bounds — election of remedy where wife refuses to assign dower rights — evidence.

Before a judgment to direct specific performance of a contract to convey premises by metes and bounds can be made, evidence of the metes and bounds must be given. Hence, where the description of the premises in the contract was simply "house 20 Jerome Street Bklyn.," parol evidence should have been introduced to establish the metes and bounds.

In a suit for specific performance, wherein the defendant definitely asserts, both in his answer and upon the trial, that his wife refuses to join in a deed, and the wife has been examined as a witness, the orderly procedure for the plaintiff is to elect to sue for damages, or to take subject to the wife's dower with an abatement in the consideration.

The evidence as to the age of the husband and wife requisite to a determination of the value of her dower right, or the necessary evidence as to damages, if the plaintiff seeks damages instead of specific performance, should be submitted at the trial so that there may be a definite final judgment.

APPEAL by the defendant, Gustave E. Kruse, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 10th day of November, 1920, on the decision of the court rendered after a trial at the Kings Special Term.

The action was brought for the specific performance of a contract for the sale of real property,

Alexander Holtzoff [*Paul Windels* with him on the brief], for the appellant.

Isaac Siegmeister, for the respondent.

KELLY, J.:

This case was before this court in May, 1920, upon an appeal by the plaintiff from a judgment sustaining a demurrer to the complaint upon the ground that it did not state a cause of action. The point involved in that appeal was the sufficiency of the alleged contract. We held that the memorandum jointly signed was sufficient. (*Weintraub v. Kruse*, 192 App. Div. 925.)

The defendant having answered, the case came on for trial, resulting in the judgment now appealed from.

There appears to be no question that the judgment for the plaintiff is warranted on the merits. The defendant, called as a witness on his own behalf, admitted the contract and the receipt. The learned counsel for defendant made some suggestion that the receipt was conditional or delivered on the understanding that it was not to be binding until a formal contract was signed, but defendant, examined as a witness in his own behalf, negatived the suggestion.

The alleged reason for defendant's refusal to perform was that his wife would not join in the deed to release her dower.

In *Maas v. Morgenthauer* (136 App. Div. 359) the presiding justice writing for this court said that while the court could

not coerce the wife, as did the old Court of Chancery, by imprisoning the husband until his wife yielded, the proper solution was to modify the decree for specific performance so as to provide that upon the failure of the defendant to deliver the deed because of the wife's refusal to join therein, the plaintiff might elect either to reject the purchase *in toto*, or to require the defendant to tender his deed subject to the dower right of the wife, whereupon the plaintiff might have an abatement in the purchase price equivalent to the gross value of the dower right, or the plaintiff might take proper steps to recover damages. (See, also, *Farley v. Secor*, 167 App. Div. 80; *Granoff v. Korpua*, 182 N. Y. Supp. 136; *Campione v. Eckert*, 110 Misc. Rep. 703.)

The appellant makes the point on this appeal, *first*, that the receipt is insufficient as a contract but concedes that this has been decided against him by this court. He then argues that the complaint should have been dismissed because the plaintiff failed to allege that defendant had title to the premises and was able to comply with the decree. I see nothing in this point because the complaint does allege that at the date of the contract defendant was the owner in fee, and defendant admits ownership in the answer and admitted on the witness stand that he was the owner. Appellant's next point is that the complaint should have been dismissed *on the merits* because plaintiff failed to prove the description of the premises to be conveyed by metes and bounds, and, therefore, there was no evidence warranting the finding of the court in which the property is described by metes and bounds.

The description of the premises in the contract was simply "house 20 Jerome Street Bklyn." The learned counsel for respondent contends that the metes and bounds were proven in defendant's evidence on cross-examination and cites the decision of this court in *Morrison v. Brenmohl* (137 App. Div. 4), that where the property is clearly identified parol evidence may be received to ascertain the exact boundaries. The trouble with the judgment appealed from is that the plaintiff, respondent, perceiving the indefinite description, should have introduced the necessary parol evidence of the description by metes and bounds. This he did not do. The reference to the somewhat labored cross-examination of defendant is, in

my judgment, insufficient. If it be said that defendant, after a fashion, testified that the premises began 118 feet $10\frac{1}{4}$ inches south of Jamaica avenue (which is not borne out by the record, his answer is "118 feet —," and that it is 40 feet front), there is no evidence as to its depth or as to the length of the rear line. So that there is no evidence to sustain the finding of fact describing the property by metes and bounds. The judgment appealed from affects the title to real estate, the proof might have been supplied, but unfortunately it was not supplied, and the objection and exception of the appellant cannot be disregarded. If the judgment is to direct specific performance of the contract to convey the premises by metes and bounds, there must be evidence of the metes and bounds.

In the next place, the defendant having definitely asserted the refusal of his wife to join in the deed, both in his answer and upon the trial, the wife having been examined as a witness, the orderly procedure was for plaintiff to elect to sue for damages, or to take subject to the wife's dower with an abatement in the consideration. Such election should have been made then and there. There is no reason for the alternative judgment referred to in *Maas v. Morgenthäler* (*supra*) on the facts here. The evidence as to the age of the husband and wife requisite to a determination of the value of her dower right, or the necessary evidence as to damages, if the plaintiff seeks damages, should be submitted at the trial so that there may be a definite final judgment.

The judgment should be reversed, without costs, and a new trial granted.

MILLS, RICH, PUTNAM and JAYCOX, JJ., concur.

Judgment reversed, without costs, and new trial granted.

AMERICAN TRUST COMPANY, Substituted as Plaintiff in Place of QUEENS COUNTY TRUST COMPANY, Respondent, v. LUCIUS N. MANLEY, Appellant.

Second Department, March 31, 1921.

Bills and notes — distinction between time of presentment of demand notes carrying interest and those not carrying interest abolished — determination of question whether demand note presented within reasonable time — accommodation indorsement — when determination of question of reasonable time is for jury.

The former distinction as to the time of presentment of demand notes carrying interest and those which do not carry interest has been done away with by the Negotiable Instruments Law.

Whether a demand note was presented within a reasonable time is a matter of fact. Where the facts are ascertained and undisputed it is for the court; otherwise, if the testimony be conflicting, for the jury.

Where the holder of a demand note testifies that, at the request and express solicitation of the accommodation indorser, it was not presented until over three and one-half years had passed, but the accommodation indorser testifies to the contrary, it is for the jury to determine whether the note was presented "within a reasonable time."

APPEAL by the defendant, Lucius N. Manley, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 2d day of December, 1919, upon the verdict of a jury, and also from an order entered in said clerk's office on the 10th day of December, 1919, denying defendant's motion for a new trial made upon the minutes.

Ira G. Darrin, for the appellant.

Henry M. Bellinger [*David Belkin* with him on the brief], for the respondent.

KELLY, J.:

The defendant was an accommodation indorser upon a promissory note for \$2,040 made by C. Gardner Miller and Arthur E. Miller to the order of Queens County Trust Company, dated May 19, 1915, and payable on demand without interest. The note was not presented for payment or protested until December 6, 1918, after the lapse of three years, six

months and seventeen days. The defendant indorser insists that such an interval exceeds a reasonable time and goes beyond the decided cases. Certainly it is a wide departure from the original conception of the liability of indorsers upon this class of commercial paper. Prior to the decision in 1861 in *Merritt v. Todd* (23 N. Y. 28) the rule, in this State at least, required the holder of a demand note, if he desired to charge the indorser, to make his demand upon the maker without delay or within a reasonable time. (*Sice v. Cunningham*, 1 Cow. 397.) The interpretation of the words "reasonable time" was a source of uncertainty and the Court of Appeals in *Merritt v. Todd* (*supra*) resolved the uncertainty by determining that in the case of a demand note bearing interest the agreement was for a productive investment of the sum for some period of time which necessarily was indefinite and ascertainable only by an actual call for the money, and that the indorser must be held to lend his name to the contract with the same intention. But this extension of the liability of the indorser, criticized as it was in subsequent cases (*Herrick v. Woolverton*, 41 N. Y. 581; *Wheeler v. Warner*, 47 id. 519; *Pardee v. Fish*, 60 id. 265; *Crim v. Starkweather*, 88 id. 339), had reference to demand notes carrying interest. As to demand notes without interest, the necessity for prompt presentment and demand continued. (In 1897 the Legislature enacted the Negotiable Instruments Law (Gen. Laws, chap. 50; Laws of 1897, chap. 612; now Consol. Laws, chap. 38; Laws of 1909, chap. 43), which does away with the distinction created by *Merritt v. Todd* (*supra*) between demand notes carrying interest and those which do not carry interest.) It is there provided (§ 131): "Where it [the instrument] is payable on demand, presentment must be made within a reasonable time after its issue." But it is further declared (§ 4): "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." Whether such a note was presented within a reasonable time is, therefore, a matter of fact. Where the facts are ascertained and undisputed, it is for the court; otherwise, if the testimony be conflicting, for the jury. (*Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210.) It

is apparent that this is a serious matter for indorsers of demand notes. Upon a time note the indorser may rely upon presentment and protest at a fixed time. Upon a demand note the question of what is reasonable time depends upon "the facts of the particular case." The door is opened to evidence of transactions between the parties aside from the language of the instrument itself, which is marked departure from the rules governing commercial paper.

The case at bar is an illustration of the result of the change brought about by the broad language of the statute. The appellant avers that during the period of more than three and one-half years between his indorsement and the demand for payment, the makers, solvent at the giving of the note, lost their property. Appellant urges that he rested in the belief that the bank had arranged the matter with the makers, or if not, that he was discharged as indorser by the lapse of time and failure to call for payment. On the other hand, it was testified by the bank manager that the delay in presentment and demand was not only with the acquiescence of the appellant indorser, but at his express solicitation and request. The learned trial justice submitted this issue to the jury, instructing them that if they found defendant had made the requests testified to by the bank manager they would be justified in finding that the presentment of the note was within a reasonable time, whereas if they were satisfied that the defendant's statement was true and that he did not ask for the extensions of time, then it would be their duty to find that the demand for payment was not made within a reasonable time and defendant was entitled to a verdict. This appears to be as favorable to the defendant as was allowable under the statute as interpreted in the *Zimmerman Case* (*supra*). It was a question for the jury upon "the facts of the particular case." The jury found for the plaintiff, and we cannot say, as matter of law, that the verdict was contrary to the evidence. It follows that the judgment and order must be affirmed.

The judgment and order should be affirmed, with costs.

Present — MILLS, RICH, PUTNAM, KELLY and JAYCOX, JJ.

Judgment and order unanimously affirmed, with costs.

AARON MARTIN, Appellant, v. MAURICE O'KEEFE, as Commissioner of Public Safety of the City of Yonkers, Respondent.

Second Department, March 11, 1921.

Municipal corporations — review of decision of police executive officers upon trial of members of force — suspension of police officer for receiving bribe — refusal on advice of counsel to appear at trial in uniform — disobedience of order of commissioner of public safety on complaint of superior officer for failure to appear in uniform is not insubordination — reinstatement — extent of duty of public safety commissioner under Second Class Cities Law, section 133.

The courts are slow to interfere with the decision of police executive officers upon trial of members of the force for violation or neglect of duty. Not only because the determination of disputed questions of fact in such cases is for the commissioner or other officer presiding at the trial under the statute, who has the opportunity to observe the witnesses, but also because the necessary discipline in such a department requires that the decision of the commissioner, who is familiar with the subject-matter and the management of the police force, should have great weight, and in the absence of obvious illegality, prejudice or ulterior motive, should be final. If review is sought, it should be had without delay.

Where a police officer was suspended for receiving a bribe, and at the time set for his trial before the commissioner of public safety he appeared in civilian clothes on advice of his attorney, as he had done on his arraignment, without objection, but was ordered by the commissioner on complaint of a superior officer to appear in uniform, shorn of his badge and other every day indicia of authority, which he refused to do, whereupon the hearing of his case was adjourned, and the superior officer then preferred charges of insubordination, on which the defendant was tried and dismissed from the police force, the order of the commissioner of public safety and the superior officer was unreasonable as matter of law.

In such case the order finding the defendant guilty of insubordination and the other charges growing out of the occurrence, and his dismissal from the police force, should be reversed and the defendant's reinstatement ordered.

Under section 133 of the Second Class Cities Law, authorizing the commissioner of public safety to make and enforce rules, etc., it is doubtful whether the commissioner could order a policeman accused of bribery to appear for trial in uniform where appearance in compliance with the order would in effect be requiring him to furnish evidence against himself.

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APPEAL by the plaintiff, Aaron Martin, a member of the police force of the city of Yonkers, pursuant to section 138 of the Second Class Cities Law, from a determination of Maurice O'Keefe, commissioner of public safety of said city, dated June 1, 1920, which finds the appellant guilty of (1) insubordination and disrespect towards his superior officer; (2) neglect and disobedience of orders; (3) breach of discipline, and (4) negligence and dereliction in the performance of his official duties, and delinquencies seriously affecting his general character and fitness for office in the police force and dismisses him from the police force.

The Second Class Cities Law (§ 138, as amd. by Laws of 1910, chap. 266) authorizes such an appeal on questions of law. There is no dispute as to the facts concerning the occurrence which was the basis of the charges resulting in the dismissal. On May 5, 1920, Captain Connolly, appellant's superior officer, preferred charges against him, in which he was accused of accepting a bribe, in that on April 28, 1920, having arrested an automobile driver for exceeding the speed limit, he released the prisoner on receiving ten dollars. The appellant, who had been on the police force for ten years, was suspended from duty as a police officer when the charges were served on him on May fifth; his shield, revolver, keys and summons book were taken from him by the captain who put them in his safe in the police station, and appellant was ordered to appear for trial on the charge of bribery before the commissioner of public safety at the city hall in Yonkers on May 10, 1920. The offense charged against the appellant in addition to violating the police rules, constituted the crime of bribery (Penal Law, § 372), which is a felony. (See Penal Law, §§ 2, 372, 2183.) It is provided in the Second Class Cities Law (§ 137, as amd. by Laws of 1910, chap. 266) that a police officer brought to trial upon charges before the commissioner of public safety "shall have the right to be present at his trial and to be heard in person and by counsel and to give and furnish evidence in his defense." On May 9, 1920, the appellant retained Mr. Cashin as his counsel to answer the charge of receiving a bribe, and with his counsel appeared before the commissioner at the city hall on May tenth and

pleaded not guilty. At that time the appellant was by advice of his counsel in civilian dress. No objection was made, his plea was received and the corporation counsel being absent the trial was adjourned, and again adjourned so that it was finally set for May nineteenth at ten o'clock in the morning. On the day last named the appellant with his counsel reached the office of the commissioner a minute or two before ten o'clock, ready for trial. There was some delay as all of the witnesses for the complainant were not present. The appellant was not in uniform and his counsel testified that he had advised him not to appear in uniform; he testifies that appellant asked him whether he should appear in uniform and counsel advised him that as he had been suspended from duty he should appear in civilian dress. It appears that appellant's uniform clothing was at his house, about one-half mile from the city hall where the trial was to take place, and his badge and other police equipment were in the safe at the second precinct station house about two miles from the city hall. About half-past ten o'clock Captain Connolly, in civilian dress, came to the appellant and his counsel who were waiting ready for trial, and the captain testifies, "I accosted the officer here in the office and told him he would have to appear at the trial in uniform;" appellant referred the captain to his counsel, Mr. Cashin, and the captain testifies that counsel answered, "Nothing doing." The captain testifies that he repeated the order and that appellant "said 'No' and referred me to his counsel." The captain then went into the office of the commissioner who was about to try the appellant on the charge of receiving a bribe, and obtained a written order from that official in the following language: "You are hereby ordered to require Patrolman Martin to appear in uniform forthwith for hearing of charges preferred against him. Maurice O'Keefe, Commissioner of Public Safety, Chief of Police." The captain returned to appellant and read the order to him, but appellant again said "'No,' and referred me to his counsel again," and counsel also said "no." Mr. Cashin, the counsel for appellant, substantially corroborates the police captain, but states that he said, "Captain, we can't do that. This man is on trial and he is suspended." When the charge of receiving a bribe was finally called for trial at

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ten-fifty A. M., appellant and his counsel announced their readiness to proceed, but Captain Connolly said he was not ready because of appellant's refusal to put on his uniform. The trial of the charge was adjourned, Captain Connolly saying, "There is nothing for me to do but prefer charges against him for his refusal to put on his uniform."

Accordingly, on May 21, 1920, Captain Connolly prepared the charges which resulted in appellant's dismissal from the police force after trial before the commissioner on May twenty-sixth, and which are now before this court upon appeal. There are four charges: *First*, insubordination and disrespect toward his superior officer in violation of police rules 33 and C, in that the appellant "when he appeared for trial" refused to put on his police uniform when directed by the captain; *second*, neglect and disobedience of orders; *third*, breach of discipline; *fourth*, negligence and dereliction in the performance of his official duties, and delinquencies seriously affecting his general character and fitness for office on the police force. The specifications on each of these charges refer to the same transaction, the refusal of appellant to put on his uniform. The charges were tried on May 26, 1920, decision was reserved, and on June 1, 1920, the commissioner made the order appealed from, in which he finds the appellant guilty of the four charges of insubordination and dismisses him from the police force.

John J. Finn [*Daniel J. Cashin* with him on the brief], for the appellant.

William A. Walsh, Corporation Counsel, for the respondent.

KELLY, J.:

The courts are slow to interfere with the decision of police executive officers upon trial of members of the force for violation or neglect of duty. Not only because the determination of disputed questions of fact in such cases is for the commissioner or other officer presiding at the trial under the statute and who has the opportunity to observe and hear the witnesses, but also because the necessary discipline in such a department requires that the decision of the commissioner, who is familiar

with the subject-matter and the management of the police force, should have great weight, and in the absence of obvious illegality, prejudice or ulterior motive, should be final. If review is sought, it should be had without delay. Indeed, in the case at bar the appeal taken on June 3, 1920, should have been brought on for hearing promptly, and there is no apparent excuse for delaying hearing or submission until March, 1921. This is not a certiorari proceeding and the statute authorizing the direct appeal (Second Class Cities Law, § 138, as amd. by Laws of 1910, chap. 266) provides that it shall be upon questions of law. The facts are not in dispute. We proceed, therefore, to examine the evidence to ascertain whether the appellant was justified in his refusal under advice of counsel to put on his uniform on the morning of his trial. It is not suggested that there was any general rule or regulation in force requiring policemen brought to trial before the commissioner to appear in uniform. When the appellant pleaded not guilty to the charge of bribery he was not in uniform and no exception was taken to it. He had been suspended from duty. His shield, revolver, club and report books had been taken from him. His uniform was at his home. He had received no previous intimation that he was to appear in uniform at the trial. Appearing with his counsel ready for trial after two adjournments had at the request of his captain, and after a delay of half an hour, he was directed to put on his uniform, which would have necessitated his leaving the trial room to go to his home, half a mile away, removing his civilian clothing and putting on the uniform of the police force from which he had been suspended. There is no explanation as to how he was to obtain his badge and other equipment, part of the uniform of the police force, if he was to be uniformed as other members of the force. There is no attempt made to cover the object of the order thus given to him, because it is frankly stated in the specifications attached to the charges of insubordination that the reason for the order was that the appellant "might appear before the witnesses at said trial in the same clothing which he wore on the day the alleged bribe was given and received," and it is also stated that "the question of identity of said Martin was a necessary part of the proof of the said charges against him." Aside from the

violation of police rules, the offense with which the appellant was charged was felony, punishable by imprisonment for not more than ten years or by a fine of not more than \$5,000 or both. (Penal Law, §§ 2, 372, 2183.) The respondent commissioner of public safety says in the order appealed from: "It is apparent from the testimony taken upon the trial that the defendant, who is alleged to have taken a bribe, had reasons other than the delay necessitated in going to his home to procure his uniform, or the fact of his suspension, or any other reasons stated by him, for not appearing in uniform worn when alleged bribing occurred. The testimony of his counsel clearly indicates that the defendant was advised to wear civilian clothes at all times when appearing for trial upon the charge of bribery and that at no future time would he appear in uniform for a hearing of the bribery charges, the most vital feature of which, would be the matter of identification. * * * It isn't a matter of merely not appearing in uniform, it is a matter of not being able to fairly conduct a hearing on the bribery charges with defendant appearing in civilian clothes." The commissioner is commendably frank in stating the reasons which actuated him in deciding the question of insubordination. But the serious question is whether he had any right to order this suspended policeman appearing before him for trial to go home and don a uniform, the right to use which had been taken from him within the law but without trial or hearing, and to appear in the commissioner's court shorn of his badge and club and other everyday *indicia* of the policeman's authority, it is said for the purpose of identification. If the respondent commissioner accorded to the policeman, as we must assume he did at any rate on the morning of the trial, the presumption of innocence of the serious charge of bribery, and if the identity of the policeman who was charged with taking the bribe was an element in the proof, he must perceive on reflection that to present the policeman marked by absence of badge and other paraphernalia would be hardly a fair way to obtain an identification. Sitting as a trial commissioner, he was performing a most important function not only for the public but for the man accused before him of a most serious crime. This court has said through Mr. Justice O'BRIEN writing for the unanimous Appellate Division in the *First*

Department: "We think a distinction is to be made between the position occupied by a commissioner generally and when he is presiding as a judge at a trial. At such times the accused has been suspended from the force, and the commissioner is acting not as his superior officer but as his judge upon the charges preferred. The rules governing judicial tribunals, therefore, and not the rules of the police department would seemingly apply. In *People ex rel. Miller v. Elmendorf* (42 App. Div. 309) it was said: 'As the proceedings are *quasi* criminal in their nature, and valuable rights of the accused official are at stake, as well as his good name, the same safeguards that are used to protect good name, fame, property or person in courts of justice should in substance be observed in these proceedings.' " (*People ex rel. Schauwecker v. Greene*, 96 App. Div. 249, 254.) The Second Class Cities Law (§ 133) authorizes the commissioner of public safety to "make, adopt and enforce such reasonable rules, orders and regulations, not inconsistent with law, as may be reasonably necessary to effect a prompt and efficient exercise of all the powers conferred and the performance of all duties imposed by law upon him or the department under his jurisdiction." But was the order to the accused policeman on the morning of the trial, to go home and put on a uniform or rather an incomplete uniform for purposes of identification which would mark him out from all other members of the police force, a reasonable rule? I have serious doubts about it. This charge of bribery has never been tried by the respondent police commissioner or any other tribunal. Having dismissed the appellant from the police force on a charge of insubordination, the felony appears to be forgotten. But surely the guilt or innocence of the police officer on the charge of receiving a bribe was of more importance to the community, to the police force and the appellant, than the refusal of the officer to go home and put on his uniform. It cannot be that the only object was to get rid of him. If that were so, the language of Judge Hiscock writing for the Court of Appeals in *Matter of Griffin v. Thompson* (202 N. Y. 104, 111) would be directly applicable: "Assuming, as the appellant did, that the order given to him was the first step towards getting rid of him, I do not see how he could safely do less or otherwise than he did. The right of self-

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defense against unlawful attack is universally conceded whether exercised in behalf of person or property and it almost savors of unintentional humor, this serious contention that the appellant was guilty of insubordination and insulting conduct because he did not in a spirit of cordial receptivity accept complainant's invitation to assist in preparing for his own official decapitation. It is true that it is now argued that appellant quite misconceived his superior's order and that it did not contemplate his removal. I am inclined to think, however, that subsequent events are the best answer to this argument and indicate that the appellant diagnosed the situation with entire accuracy." When a police officer is charged with a breach of the police rules and regulations which is in fact a most serious felony, it would seem that all purposes of police discipline are accomplished by his prompt suspension from performance of his duties. The felony overshadows the violation of the rule and should be at once referred to the district attorney who has in charge the prosecution of crime. If this accused policeman is convicted, there is no necessity for trial for violation of the rules of the department. There is grave doubt whether in a case such as this, where appellant was accused of crime, he could be compelled to furnish evidence against himself in the manner here proposed. The Legislature in investing the commissioner with power to try the accused expressly provides that he shall have the right to be heard in person and by counsel. (Second Class Cities Law, § 137, as amd. by Laws of 1910, chap. 266.) In the case at bar it is conceded that the refusal of the appellant to leave the place fixed for his trial and to go home and array himself in such part of his uniform as was left to him, was based upon the advice of counsel given in a proper way and not criticised as disrespectful to the captain or the commissioner. If the right to counsel secured to the accused by the statute means anything, the action of the suspended police officer in following that advice cannot be made the basis of a charge of insubordination. I think the order of the police captain and the commissioner was unreasonable as matter of law, and that the order finding the appellant guilty of insubordination and the other charges growing out of the occurrence referred to and dismissing him from the police force should be reversed.

I recommend: Determination of commissioner of public safety of the city of Yonkers, convicting appellant of insubordination and dismissing him from the police force, reversed, and appellant reinstated, with costs to appellant.

MILLS, RICH, BLACKMAR and JAYCOX, JJ., concur.

Determination of commissioner of public safety of the city of Yonkers convicting appellant of insubordination, and dismissing him from the police force, reversed, and appellant reinstated, with costs to appellant.

In the Matter of an Application for Leave to Enter into Possession and to Manage and Control and Receive the Rents of Real Property Left by CHARITY C. MOULD, Deceased.

DIURNAL REALTY CORPORATION, Appellant; BENJAMIN H. SWEET, as Executor, etc., of CHARITY C. MOULD, Deceased, Respondent.

Second Department, March 11, 1921.

Executors and administrators — when executor is properly granted leave under Code of Civil Procedure, section 2701, to enter into possession of testator's real property and manage and control same — effect of transfer by non-resident legatee of her interest in estate before probate of will — constitutional law — due process of law.

The application of an executor made under section 2701 of the Code of Civil Procedure immediately after the probate of a will, to enter into possession of the real property disposed of therein and to manage and receive the rents of the same, should be granted, where it appears that there are legacies to be paid out of the estate of the decedent to the amount of \$35,500; that the total personal estate at the time of decedent's death did not exceed \$20,000 and her equity in real property did not exceed \$20,000, with an indebtedness of \$2,000; that the residuary devisee, a non-resident, divested herself of all her interest in the real property prior to the probate of the will; that an application by the executor is pending before the surrogate for a judicial construction of the will to ascertain whether the real property is charged with the payment of the legacies, and that there are installments of interest and principal falling due on mortgages, which if not paid may bring about foreclosure.

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Such an order does not deprive the residuary devisee, or her grantee, of property without due process of law, since no constitutional right of the devisee is interfered with, as she takes the real estate of the decedent subject to any claims against it, whether by creditors or legatees.

APPEAL by Diurnal Realty Corporation from an order of the Surrogate's Court of the county of Westchester, entered in the office of the clerk of said court on the 6th day of December, 1920, granting leave to the executor of Charity C. Mould, deceased, to enter into possession of the real property of the deceased and to manage and control the same and receive the rents thereof, until further order of the court.

C. Bertram Plante, for the appellant.

Thomas J. Towers, for the respondent.

KELLY, J.:

Charity C. Mould died on May 22, 1920, leaving a will which was admitted to probate by the surrogate of Westchester county on October 8, 1920, in which she bequeaths an aggregate sum of \$40,500, as well as various articles of personal property in legacies to her sister, niece, nephew and other persons named. The residue of her estate, real and personal, including a cemetery lot, she gives, devises and bequeaths to Florence A. Coombs, "who grew up as a child in my family and lived with me for many years, the same to have and to hold forever." In the 10th paragraph of her will she gives her executor power to sell and convey all or any part of her real estate at public or private sale and on such terms as he may deem proper, with full power to execute necessary deeds or other papers.

The will is dated February 5, 1919. One of the legatees named died before the testatrix, reducing the aggregate of the legacies to \$35,500. The total personal estate at the date of the will did not exceed \$26,000, and at the date of death did not exceed \$20,000. The testatrix left several parcels of real estate, but one of which was income producing and that was incumbered by mortgage. The equity of the testatrix in the various parcels did not exceed \$20,000. Her other indebtedness did not exceed \$2,000.

On September 29, 1920, Florence A. Coombs, the residuary

devisee and legatee, who resides in the State of Michigan, without waiting for the probate of the will, made a deed of all of the real property of the decedent to the appellant, the Diurnal Realty Corporation.

The will having been admitted to probate on October 8, 1920, the executor at once made application to the surrogate for a judicial construction of the instrument to determine whether the real property of the testatrix was charged with the payment of the legacies, and applied under section 2701 of the Code of Civil Procedure for an order granting to him leave pending the decision of the surrogate on the construction of the will to enter into possession of the real property of the decedent and to manage and control the same and receive the rents and profits thereof. He alleges that there are installments of principal and interest falling due on the mortgages which, if not paid, may bring about foreclosure, and he considers it to be his duty pending the determination of the question whether the legatees have a right to look to the real property for payment, to protect it from the vicissitudes which might result in its disappearance. Apparently he is not reassured by the conveyance made by Miss Coombs before the probate of the will.

The surrogate granted the order applied for, allowing the executor to enter into possession of the real estate, stating in his opinion: "If the prayer of the petitioner in the other pending proceeding, relating to the implied charge of legacies upon the real estate, be denied, then an order placing the executor in charge of the real estate may be set aside." (113 Misc. Rep. 602.)

The Diurnal Realty Corporation, the grantee in the deed made in advance of the probate, appeals from the order upon the ground that the surrogate was without jurisdiction to make it; that the residuary legatee or devisee was the owner of the realty upon the death of the testatrix, and that section 2701 of the Code of Civil Procedure, if interpreted according to the surrogate's decision, is unconstitutional as depriving the residuary devisee and the appellant, her grantee, of their property without due process of law.

I can find no decision on the point raised by the appellant. Section 2701 of the Code of Civil Procedure was added in the

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revision of the Code provisions relative to surrogates and surrogates' courts. (Laws of 1914, chap. 443.) It reads as follows:

" § 2701. When rents of real property may be received by the executor or administrator. An executor or administrator may present a petition to the surrogate's court praying for leave to enter into possession of real property left by his decedent and to manage and control the same and receive the rents thereof. If from such petition it shall appear that a mortgage, lease or sale of such real property will be necessary unless the purposes specified in section 2703 of this title be otherwise fulfilled, a citation shall issue to all known persons within the State of New York who have the legal title to such real estate by descent or devise to show cause why the prayer of the petition should not be granted. Upon the return of the citation the surrogate may, in his discretion, grant the prayer of such petition upon such terms and conditions as justice shall require. The net rents so collected shall be held by the executor or administrator and be brought into court upon the judicial settlement of the account of such executor or administrator and there disposed of as provided in section 2711 of this title for the disposition of proceeds of mortgage, lease or sale of real estate."

The revisers say in their note to the section:

" Note.— It has always worked out as an injustice to creditors that the heir or devisee should be able to collect rents for many months from real estate which equitably belonged to the creditors. It has also worked injustice to resident and competent part owners that their interests should be sold when a few months' rent would have discharged all the debts. Therefore, it has seemed to be wise and just, and within the power of the court, to authorize the representative to enter into possession of the real estate, when all of it may eventually be required to be mortgaged, leased or sold, and to collect the rents and bring them into court upon his judicial settlement to be accounted for and applied as may be necessary. This plan will also put someone in charge of real estate owned by non-residents, absentees or incompetents, where now no one has the right to collect the rents." (Senate Doc. 1914, vol. 11, No. 23, p. 228.)

I do not think that the surrogate, upon the application which resulted in the order appealed from, was called upon to decide the question whether the legacies were chargeable upon the real estate of the decedent, or that this court is called upon to decide the question upon this appeal. It cannot be denied that the executor was entirely within his rights in promptly applying to the surrogate for construction of the will and that such construction was within the power and jurisdiction of the Surrogate's Court. (Code Civ. Proc. §§ 2490 [former § 2481], 2510, 2615; *Borrowe v. Corbin*, 31 App. Div. 172; *affd.*, 165 N. Y. 634; *Matter of Friedell*, 20 App. Div. 382.) If the legacies in this will are chargeable upon the real estate, it may if necessary be sold under the Code of Civil Procedure (§ 2703, subd. 5) for the payment thereof, notwithstanding the devise to Miss Coombs. In such case the executor may be called upon to exercise the power of sale given to him in the will. The devise is subject to lawful claims against the real estate. The petition of the executor upon which the order appealed from was granted makes out a *prima facie* case at least, and I think the executor under the circumstances here presented is justified, pending decision of his application for construction, in his effort to preserve the *status quo*.

I think the new section 2701 is applicable to such a situation. It is true that the revisers in their note refer to the injustice worked to creditors by the collection by heirs of rents from real estate which equitably belongs to the creditors, but the same reasoning applies in the case of legatees who may have the right to look to the real estate for payment of their legacies. It is also wise and just that, pending prompt ascertainment of the rights and equities of all parties interested in the estate, the Surrogate's Court, which is the tribunal immediately charged with the management and supervision of decedents' estates, should have the power to protect the property in the interest of all concerned. No constitutional right of the devisee is interfered with. She takes the real estate of the decedent subject to any legal claim against it, whether by creditors or legatees. The Code section provides that upon notice to and after hearing all persons within the State who have legal title to the real estate the surrogate "may, in his discretion, grant the prayer of such petition upon such terms

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and conditions as justice shall require." This appears to be a reasonable and orderly procedure in the case at bar where the residuary devisee is a non-resident of the State who, in advance of probate of the will upon which her title depends, has divested herself of all her interest in the real estate of decedent under that instrument. There is no charge of laches or delay on the part of the executor in the performance of his duties, the devisee loses nothing except the right to immediate possession of the real estate and the rentals which may not belong to her. If they do belong to her free from claims of creditors and legatees, she will receive her property promptly upon the decision of the surrogate on the construction of the will. I think the order appealed from is within the spirit of the legislative intent and within the language of the section referred to, and advise affirmance of the order.

The order of the Surrogate's Court of Westchester county should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., RICH, PUTNAM and BLACKMAR, JJ., concur.

Order of the Surrogate's Court of Westchester county affirmed, with ten dollars costs and disbursements.

In the Matter of NORVIN R. LINDHEIM, an Attorney,
Respondent.

First Department, March 11, 1921.

Attorney and client — disbarment — conviction in Federal courts of felony — appeal cannot delay disbarment — vacating order of disbarment on reversal of judgment of conviction.

Where an attorney has been convicted in the Federal courts of the crime of conspiracy, which is a felony within the definition of section 335 of the United States Criminal Code, he automatically ceases to be an attorney or competent to practice as such, by force of section 477 of the Judiciary Law, and under subdivision 3 of section 88 of the Judiciary Law the Appellate Division must strike his name from the roll on presentation of a certified or exemplified copy of the judgment of conviction,

and the action of the Appellate Division cannot be deferred because he has appealed from the judgment of conviction.

If the judgment of conviction should be reversed application may then be made to the court for the vacation of the order.

DISCIPLINARY PROCEEDINGS instituted by the Association of the Bar of the City of New York.

Einar Chrystie, for the petitioner.

Crim & Wemple, for the respondent.

CLARKE, P. J.:

This matter comes before the court upon the petition of the Association of the Bar of the City of New York and an answering affidavit in behalf of the respondent.

The respondent was admitted to practice as an attorney and counselor at law at the May, 1903, term of the Appellate Division, First Department, and has practiced as such since his admission. As appears by a duly certified copy of an extract from the minutes of the United States District Court for the Southern District of New York, the respondent was tried upon an indictment in said court for conspiracy with others "to defraud the United States by obstructing, impeding, hindering and delaying the United States in, and preventing the United States from seizing, capturing, receiving, holding, administering, assuming the control of and title to certain indebtedness of one Edward A. Rumely to the Imperial German Government, an enemy of the United States," the United States being then at war with the Imperial German Government, under section 37 of the United States Criminal Code (35 U. S. Stat. at Large, 1096) which provides as follows: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The respondent was convicted on the 18th of December, 1920, and on the twentieth of December was sentenced to serve a term of one year and one day in the United States

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penitentiary, Atlanta, Ga. Section 335 of the United States Criminal Code (35 U. S. Stat. at Large, 1152) provides: "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies."

Section 477 of the Judiciary Law provides that an attorney and counselor at law who shall be convicted of a felony shall upon such conviction cease to be an attorney and counselor at law or to be competent to practice law as such. Subdivision 3 of section 88 of the Judiciary Law provides that whenever an attorney and counselor at law shall be convicted of a felony there may be presented to the Appellate Division of the Supreme Court a certified or exemplified copy of the judgment of such conviction and thereupon the name of such person so convicted shall by order of the court be stricken from the roll of attorneys.

The answering affidavit admits that the matters set forth in the petition and the exhibits thereto attached are true. It further alleges that an appeal from the said judgment of conviction was immediately taken by the said respondent and is being pressed to a hearing and decision as rapidly as possible.

The provisions of the Judiciary Law above cited are mandatory in case of a conviction for felony and upon such conviction the result prescribed follows automatically, and upon presentation of the facts to the court, the prescribed order must be made. If the judgment of conviction shall be reversed upon appeal a proper application may then be made to the court for the vacation of the order now required to be entered. (Judiciary Law, § 88, subd, 4.)

The respondent is disbarred.

LAUGHLIN, DOWLING, SMITH and GREENBAUM, JJ., concur.

Respondent disbarred. Settle order on notice.

In the Matter of S. WALTER KAUFMANN, an Attorney,
Respondent.

First Department, March 11, 1921.

(See head note in *Matter of Lindheim*, ante, p. 827.)

DISCIPLINARY PROCEEDINGS instituted by the Association of
the Bar of the City of New York.

Einar Chrystie, for the petitioner.

Crim & Wemple, for the respondent.

CLARKE, P. J.:

The respondent was admitted to practice as an attorney and counselor at law at the October, 1905, term of the Appellate Division, First Department, and has practiced as such attorney since his admission.

He was joined as a defendant in the same indictment referred to in *Matter of Lindheim* (195 App. Div. 827), handed down herewith, and was convicted at the same time and for the same offense and received the same punishment.

It follows for the reasons set forth in said opinion that he must be disbarred.

LAUGHLIN, DOWLING, SMITH and GREENBAUM, JJ., concur.

Respondent disbarred. Settle order on notice.

BARNET LAZARUS, Respondent, v. HENRY WIERNICKI,
Appellant.

First Department, March 11, 1921.

**Pleadings — answer — general denial on information and belief
good — motion to strike out answer as frivolous.**

A general denial of the allegations of a complaint upon information and belief is good.

In an action to recover for goods sold where the complaint does not allege that the goods were sold to the defendant in person and the answer is a

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general denial upon information and belief, the plaintiff may move to strike out the answer as frivolous under section 537 of the Code of Civil Procedure, when defendant may show, if he can, that the denials were made in good faith and were really not frivolous.

APPEAL by the defendant, Henry Wiernicki, from an order of the Supreme Court, made at the Bronx Special Term and entered in the office of the clerk of the county of Bronx on the 22d day of December, 1921, granting plaintiff's motion for judgment on the pleadings.

Abram Zoller [*Earl A. Darr* of counsel], for the appellant.

Sol. S. Hauben, for the respondent.

DOWLING, J.:

This action is brought to recover the sum of \$719.01 for goods, wares and merchandise sold and delivered to defendant at his special instance and request. The answer of the defendant "denies, upon information and belief, each and every allegation contained in paragraphs marked 'First,' 'Second' and 'Third' of said complaint."

The remaining paragraph of the complaint, the fourth, alleging the residence of the parties, is not denied. Plaintiff moved for judgment on the pleadings, which was granted. Plaintiff now contends that the form of denial is bad as he does not know under it what claim defendant will make upon the trial, whether it is a question of authority, reasonableness of value or the actual receipt of the goods; that the denial being bad in form, the complaint, therefore, stands uncontradicted and judgment on the pleadings was properly granted.

Section 500 of the Code of Civil Procedure provides that the answer of the defendant must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." Reading this section in connection with sections 524 and 526 of the Code of Civil Procedure it is clear that a general or specific denial under the provisions of section 500 may be upon information and belief. (*Bennett v. Leeds Manufacturing Company*, 110 N. Y. 150.) In that case it was said: "This section also recognizes allega-

tions (which manifestly include denials) made upon information and belief, as proper forms of pleading. We think, therefore, upon reason as well as upon the construction of the Code, a denial in a verified answer of a material allegation in the complaint, 'upon information and belief,' is good. Any other conclusion would lead in some cases to great injustice."

In the case at bar the allegations of the complaint are as to matters not necessarily within defendant's knowledge since he might well have personally had no connection with the transaction which in the ordinary course of business may have been conducted by an agent or employee. The plaintiff's contention supports this, since he says he is left in doubt by the answer as to whether a question of authority is involved, thus leading to the necessary inference that the matter was conducted with some representative of defendant and not with him personally. If the sale of these goods was made to defendant in person, since the complaint did not disclose that fact, and the answer was sufficient under section 500, the plaintiff's remedy would have been to move to strike it out as frivolous under section 537 of the Code of Civil Procedure, when defendant would have had the opportunity of proving, if he could, that the denials were made in good faith and were really not frivolous. (*Cerlian v. Bacon*, 155 App. Div. 118; 123.)

The order appealed from is reversed, with ten dollars costs and disbursements, and the motion is denied, with ten dollars costs.

CLARKE, P. J., LAUGHLIN, SMITH and GREENBAUM, JJ.,
concur.

Order reversed, with ten dollars costs and disbursements,
and motion denied, with ten dollars costs.

ERNESTO BEGNI DEL PIATTA, Respondent, v. PABLO MENDOZA,
Appellant.

First Department, March 11, 1921.

Process — service of summons by publication — order for publication may be granted in action for money only against non-resident though warrant of attachment not levied — Code of Civil Procedure, sections 438 and 439, as amended by Laws of 1920, chapter 478, construed — affidavits in support of warrant of attachment showing cause of action for anticipatory breach of contract.

In an action against a non-resident to recover a sum of money only, an order for service of summons by publication may be granted though a warrant of attachment has not been levied upon property of the defendant within the State.

The effect of the amendment to sections 438 and 439 of the Code of Civil Procedure by chapter 478 of the Laws of 1920 is to add to the class of cases wherein an order of publication may be made, as set forth in the seven subdivisions of section 438, a new class, namely, an action for a sum of money only, where a warrant of attachment granted in the action has been levied upon property of the defendant within this State, and the amendment was not intended to limit or restrict the rights conferred by subdivision 1 of section 438 of the Code of Civil Procedure, as to the obtaining of an order for publication where the defendant is a non-resident of the State.

Additional affidavits submitted in support of the second cause of action set forth in the complaint met any infirmity in those originally submitted and show an anticipatory breach of contract by the defendant, and a repudiation by him of the agreement, which is actionable.

APPEAL by the defendant, Pablo Mendoza, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of January, 1921, denying defendant's motion to vacate an order directing the service of the summons herein by publication, and to vacate the warrant of attachment granted herein or in the alternative to modify the same.

Forsyth Wickes [*Nathan F. George* of counsel], for the appellant.

Benoni Lockwood [*Henry F. Herbermann* of counsel], for the respondent.

DOWLING, J.:

This action was brought to recover the amount of \$8,100 upon two causes of action based upon contracts alleged to have been made by defendant on June 4, 1920, whereby he was to pay plaintiff the sum of \$2,900 and \$6,200, respectively, for the preparation, modelling, sculpturing and delivery of certain figures in cement and in bronze.

On December 10, 1920, a warrant of attachment was obtained against the property of the defendant upon the grounds that the action was brought to recover a sum of money only as damages for breach of contract, express or implied, other than a contract to marry, and that defendant was a non-resident of the State of New York, residing at Havana, Cuba. On the same day an order was made for service of the summons herein by publication, upon the ground that defendant was a non-resident of this State and was then actually in Cuba.

The defendant has appeared specially and moved to vacate both these orders.

The motion to vacate the order of publication is made upon the ground that the moving papers on which it was granted failed to show that a warrant of attachment, granted in the action, had been levied upon the property of the defendant within the State of New York. This contention is based upon the amendments made to the Code of Civil Procedure by chapter 478 of the Laws of 1920. Thereby section 438, providing for the cases wherein an order for service of summons by publication might be made, was amended as to subdivision 5 so as to read as follows:

"5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the State; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property; or *where it appears by affidavit that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the State.*" (The matter added to the original subdivision is that italicized.)

By the same chapter, section 439 of the Code, relating to the papers upon which an order for publication may be made, was amended so as to read as follows:

“ The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, *or upon a verified complaint to recover a sum of money only and proof by affidavit that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the State*, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon the ground that the defendant is a foreign corporation, or not a resident of the State, or in a case specified in subdivision fourth, fifth, or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.” (Here also the new matter is that which is italicized.)

It will be seen that the effect of these amendments is to add to the class of cases wherein an order of publication may be made, as set forth in the seven subdivisions of section 438, a new class, viz., an action for a sum of money only, where a warrant of attachment granted in the action has been levied upon property of the defendant within this State. This situation is similar to that of the other cases provided for by the section, in that property belonging to the defendant is situated within the State and subject to the jurisdiction of the court to render its judgment effective, as the other cases enumerated relate to real or personal property within the State, and the determination of an interest in, a lien upon, or the title thereto. In the case at bar the action is one to recover a sum of money only, but no warrant of attachment, granted in the action, had been levied upon property of the defendant within the State when the application for the order of publication had been made and, therefore, the provisions of subdivision 5 of section 438 had not been complied with. It is the contention of the appellant herein that the provisions of this subdivision are exclusive and that where the action is one for a sum of money only this subdivision alone is applicable. I do not believe that this contention is well founded. Under subdivision 1 of section 438, which has not been amended since 1913, an order of publication is authorized where the defendant to be served is a foreign corporation or an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this State,

or a domestic corporation where service cannot be made within the State upon the president or other specified officials thereof, or "being a natural person, is not a resident of the State," or where after diligent inquiry the defendant remains unknown to the plaintiff or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the State. So, also, there has been no amendment of subdivisions 2 and 3 relative respectively to residents who have departed from the State with intent to defraud their creditors or with intent to avoid service of the summons or are keeping themselves concealed therein with like intent, or where the defendant being a resident of the State and an adult has remained continuously without the State for more than six months and has made no designation of a person upon whom the service of a summons in his behalf may be made, or where such designation no longer remains in force, or where the service upon the person designated cannot be made. (See Laws of 1899, chap. 301; Laws of 1909, chap. 492; Laws of 1913, chap. 179; Laws of 1914, chap. 346.) The argument advanced by the appellant herein would render impossible the obtaining of an order of service by publication in these specified cases if the action was one for a sum of money only, unless a warrant of attachment had first been issued and property within the State levied upon thereunder. I find no legislative expression of any such intent. The amendment does not undertake to reduce or limit the classes of cases in which an order of publication may be made, but adds a new class thereto, which is that where the action is one to recover a sum of money only and levy has been made under warrant of attachment within the State, the right of service by publication is granted, irrespective of whether the defendant is or is not a resident of the State; the only limitation thereon is that contained in section 439, that the plaintiff must show that he has been or will be unable with due diligence to make personal service of the summons, which provision also applies to an application for the order under the 1st subdivision of section 438. The cases in which an order for service by publication and a warrant of attachment may be obtained are not identical. Thus, under section 636, subdivision 2, of the Code of Civil Procedure, a warrant of attachment may be obtained where the

defendant is a natural person or a domestic corporation and has removed or is about to remove property from the State with intent to defraud his or its creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete, property with a like intent; or where for the purpose of procuring credit or the extension of credit, the defendant has made a false statement in writing under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence, as to his financial ability or standing. Prior to the amendment in question, while an attachment could be granted upon the grounds just enumerated, they furnished no basis for the granting of an order of publication. Under section 638 of the Code of Civil Procedure personal service of the summons must be made upon the defendant within thirty days after the granting of the warrant, or publication of the summons must be commenced, pursuant to an order, within that time. The reasonable construction of the amendment made by chapter 478 of the Laws of 1920 is that it was intended to extend the right to publish the summons to such cases as those heretofore enumerated, wherein a warrant of attachment might be issued but which would be ineffective if property was levied upon thereunder and personal service could not be made within thirty days, since under the prior state of the statute an order of publication could not be made in such cases; and, therefore, if personal service could not be made within the thirty days the remedy given by the attachment would be of no avail.

My conclusion is that the amendment in question was not intended to, and did not in fact, limit or restrict the right conferred by subdivision 1 of section 438, as to the obtaining of an order of publication where the defendant was a non-resident of this State, and that conclusion is confirmed by the language of section 439, as amended, which clearly differentiates between applications made for an order of publication upon the ground of non-residence and those made in the cases specified in subdivisions 4, 5 and 7 of section 438, which includes the subdivision under consideration. In all of these cases the requirement is similar, that plaintiff must show that he has been or will be unable with due diligence to make personal service of the summons, but the differentiation between these cases shows that

they are all still deemed to be effective and applicable. It follows, therefore, that plaintiff's application for the order for service of the summons by publication having been duly made under subdivision 1 of section 438, and it appearing that the defendant was not a resident of the State and could not with due diligence be personally served therein, the order was properly granted and should be affirmed.

Having reached the conclusion that the order of publication was valid, it follows that the warrant of attachment should not be vacated upon the ground assigned therefor by the appellant, namely, that no valid order of publication had been made within thirty days after the granting of the warrant.

As to the defendant's contention that the second cause of action set forth in the complaint is insufficiently supported by the affidavits submitted in support of the warrant, I am of the opinion that the additional affidavits have met any infirmity in those originally submitted and show an anticipatory breach of contract by the defendant, and a repudiation by him of the agreement, which is actionable. (*Thomas v. Gage*, 156 N. Y. 612.)

The order appealed from is, therefore, affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., SMITH, PAGE and GREENBAUM, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

INGERSOLL-RAND COMPANY, Respondent, v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Appellant.

First Department, March 11, 1921.

Evidence — judicial notice — jurisdiction of Supreme Court over action against corporation in which United States government owns more than half of stock.

The Appellate Division can take judicial notice of the acts of Congress and of the executive orders of the President of the United States made pursuant thereto, and of historical facts of general interest.

When Congress provided for the incorporation of the defendant, under the laws of the District of Columbia and authorized the Shipping Board

for and on behalf of the United States to subscribe for not less than one-half of the capital stock thereof, it authorized the creation of an artificial person capable of suing and being sued, as any other corporation of the District of Columbia, and in subscribing and holding stock in that corporation the United States laid aside its sovereign character and took that of a private citizen, a stockholder in the corporation, exercising its power as every other stockholder, by its vote in stockholders' meetings. Such corporation, and not the government, became liable for its debts, and satisfaction for such debts is to be obtained out of its property and not as a claim against the United States.

Therefore, where its agent, a New York corporation, purchased merchandise in the city of New York, from a corporation authorized to do business in this State, the courts of this State have jurisdiction over the cause of action, and by service of process acquired jurisdiction of the defendant.

APPEAL by the defendant, United States Shipping Board Emergency Fleet Corporation, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of October, 1920, sustaining the demurrer of the plaintiff to the affirmative defense alleged in the answer.

William Y. C. Anderson of counsel [*John E. Walker* and *E. E. Jacobsen* with him on the brief; *Francis G. Caffey*, *United States attorney*], for the appellant.

Albert M. Lee of counsel [*Harry N. Wessel*, attorney], for the respondent.

PAGE, J.:

This action is to recover the sum of \$1,477.85 from the defendant, a corporation organized and existing under the laws of the District of Columbia, as the undisclosed principal of the Fougner Concrete Ship Building Co., Inc., a domestic corporation, to which the plaintiff, a New Jersey corporation, sold and delivered pneumatic tools of the agreed price and value of \$2,463.35, upon account of which \$985.50 has been paid.

The separate defense in the answer which is challenged is as follows:

"3. The defendant is a corporation organized April 16, 1917, pursuant to sub-chapter 4 of the incorporation laws of the District of Columbia and in pursuance of Section 11 of

the Act of Congress entitled 'An Act to establish a United States Shipping Board' approved September 7, 1916; that its corporate object is and at all times has been as set forth in said section of said Shipping Act of 1916, to wit, the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States; that in pursuance of said Shipping Act of 1916 and the several acts of Congress beginning with the Urgent Deficiencies Appropriation Act of June 15, 1917, and ending with the Sundry Civil Act of July 19, 1919,* the said United States Shipping Board Emergency Fleet Corporation has been and at all the times mentioned in the complaint was the delegate or deputy of the President of the United States in the exercise of the power and authority vested in him for the construction of vessels, the purchase or requisition of vessels in process of construction or of contracts for the construction of such vessels and the completion thereof and for the production, purchase and requisitioning of materials for ship construction, the said acts having empowered and authorized the President to exercise the power and authority vested by them in him through such agency or agencies as he should determine from time to time; and that under and in accordance with the provisions of an executive order dated July 11, 1917, the defendant was designated as agent of the President to have and to exercise all the power and authority vested in the President under the said acts referred to herein. That this action is in substance and effect an action against the United States of America and as such was not maintainable as against this defendant."

The question raised by the demurrer is whether this is an action against the United States. If it is, this court has no jurisdiction of the action. The allegation to that effect in the defense is not admitted by the demurrer, that being a conclusion drawn by the defendant from the facts set forth in the answer. In considering this case we can take judicial notice of the acts of Congress and of the executive orders of the President of the United States made pursuant thereto, and of historical facts of general interest.

* See 41 U. S. Stat. at Large, 180, chap. 24.—[REp.]

The act of Congress passed and approved by the President September 7, 1916 (39 U. S. Stat. at Large, 728, chap. 451), authorized the appointment of the United States Shipping Board, for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions, and for other purposes. Section 11 of this act provides: "That the board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed \$50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this Act. The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein * * * ." (39 U. S. Stat. at Large, 731, § 11.)

In accordance with its provisions, the United States Shipping Board was duly constituted and on April 16, 1917, ten days after the declaration of a state of war between the United States and Germany,* the defendant was incorporated under sub-chapter 4 of the Incorporation Laws of the District of Columbia,† and in accordance with section 11 of the act of September 7, 1916, set forth in its charter, its objects to be "the purchase, construction, equipment, lease, maintenance, and operation of vessels in the commerce of the United States, and in general to do and perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon cor-

* See 40 U. S. Stat. at Large, 1, chap. 1; Id. 1650.—[REF.]

† See 31 U. S. Stat. at Large, 1284, § 605 *et seq.* as amd.—[REF.]

porations under said sub-chapter 4 of the Incorporation Laws of the District of Columbia."

Our attention has been called by the learned counsel for the defendant to certain other acts of Congress thereafter passed making appropriations of money (Urgent Deficiencies Act, 40 U. S. Stat. at Large, 182, chap. 29) and extending the President's power to take over certain transportation systems (40 U. S. Stat. at Large, 535, chap. 62), and to the President's executive orders of July 11, 1917, June 18, 1918, and December 3, 1918 (Official U. S. Bulletin, July 13, 1917, vol. 1, No. 54, p. 1; Id. June 20, 1918, vol. 2, No. 340, p. 10; Id. Dec. 5, 1918, vol. 2, No. 480, p. 3), delegating such power as was given to him to the Shipping Board or to this defendant. These subsequent statutes and orders have no particular bearing on the case under consideration, as they in no way change the character or purpose of the original act or the charter powers of the defendant. The transaction for which it is sought in this action to hold it responsible was well within its original charter powers.

When Congress provided for the incorporation of the defendant under the laws of the District of Columbia and authorized the Shipping Board for and on behalf of the United States to subscribe for not less than one-half of the capital stock thereof, it authorized the creation of an artificial person capable of suing and being sued, as any other corporation of the District of Columbia. The United States laid aside its sovereign character and took that of a private citizen, a stockholder in the corporation, exercising its power, as every other stockholder, by its vote in stockholders' meetings. This has been the settled law in this country since Chief Justice MARSHALL's opinion in *United States Bank v. Planters' Bank* (9 Wheat. 904, 907), in which he said: "The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it. It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends

to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * * The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the Constitution." (See, also, *Bank of Kentucky v. Wister*, 2 Pet. 318, 323; *Briscoe v. Bank of Commonwealth of Kentucky*, 11 id. 257; *Darrington v. Bank of Alabama*, 13 How. [U. S.] 12; *Curran v. State of Arkansas*, 15 id. 304; *Barings v. Dabney*, 19 Wall. 1; *Salas v. United States*, 234 Fed. Rep. 842; *Panama R. R. Co. v. Curran*, 256 id. 768.)

The business in which this defendant corporation was to be engaged was such as had theretofore been conducted by private persons and corporations. The building, purchasing, leasing and operating of ships from time out of mind had been conducted by private enterprise. When the government decided to invest capital in such business, it authorized the incorporation of a business corporation and became a stockholder therein. Such corporation, and not the government, became liable for its debts, and satisfaction for such debts is to be obtained out of its property and not as a claim against the United States. Therefore, where its agent, a New York corporation, purchased merchandise in the city of New York from a corporation authorized to do business in and, therefore, a resident of this State, the courts of this State have jurisdiction over the cause of action, and by service of process the Supreme Court has acquired jurisdiction of the defendant.

The question of the character of the defendant has been before the United States District Courts in several cases, with somewhat varying results. (Compare *Gould Coupler Co. v. U. S.*

Shipping Board, E. F. C., 261 Fed. Rep. 716; *Commonwealth Finance Corp. v. Landis (E. F. C.)*, Id. 440; *Lord & Burnham Co. v. U. S. Shipping Board, E. F. C.*, 265 id. 955; *Perna v. U. S. Shipping Board, E. F. C.*, 266 id. 896; *Banque Russo-Asiatique-London v. U. S. Shipping Board, E. F. C.*, Id. 897; *Ingram Day Lumber Co. v. U. S. S. B. E. F. C.*, 267 id. 283, with *Southern Bridge Co. v. U. S. S. B. E. F. C.*, 266 id. 747; *Sloane Ship Yards Corp. v. U. S. S. B. E. F. C.*, 268 id. 624.)

It is not necessary to consider these cases, for in my opinion the Supreme Court of the United States has settled the question by applying the principle stated in *United States Bank v. Planters' Bank* (*supra*) to this corporation in a case decided about the time the instant case was argued but in which the opinion was not available until after this case was decided at consultation. (*United States v. Strang*, 254 U. S. 491, decided Jan. 3, 1921.) Strang was indicted, charged with having unlawfully acted as an agent of the United States in transacting business for the Shipping Board Emergency Fleet Corporation with a partnership of which he was a member. A demurrer to the indictment was sustained. On writ of error, this judgment was affirmed, the court saying: "The corporation was controlled and managed by its own officers and appointed its own servants and agents, who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. * * * Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation." (Citing *United States Bank v. Planters' Bank*, *supra*, and other cases.)

The order sustaining the demurrer is affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., LAUGHLIN, SMITH and MERRELL, JJ., concur.

Order affirmed, with ten dollars costs and disbursements.

WILLIAM SIEGEL, Respondent, v. SPEAR AND COMPANY,
Appellant.

First Department, March 11, 1921.

Bailments — authority of agent to make contract — agreement by bailee to insure property — liability of bailee where property lost by fire without insurance — measure of damages — sufficiency of evidence.

The agreement made by defendant's agent to store, free of charge, and obtain insurance on the furniture of the plaintiff which the latter had bought from the defendant on monthly installments, was binding on the defendant, since the act was within the apparent scope of the agent's authority and the defendant accepted the goods and stored them without compensation, and did not suggest that the agent did not have power to make the agreement.

The abandonment by the plaintiff of his purpose to insure the goods in storage, in reliance on defendant's promise to do so was a sufficient consideration for defendant's promise, and furthermore, both had an interest in the property and the insurance was for their mutual benefit and this alone would have supported the promise to insure.

Accordingly, the furniture having been burned while in defendant's possession, it was liable to the plaintiff for the damage suffered by him.

As there was no proof that the plaintiff had actual notice that the defendant had not insured the furniture, and as notice cannot be implied from the failure of the defendant to send a bill for the premium which it stated it would do, the measure of damage is the value of the property up to the amount of the insurance which the defendant was to procure.

Evidence that the furniture was in first class condition and that furniture generally had increased in value since the purchase from fifty to seventy-five per cent was sufficient proof to justify the amount of the verdict. The jury had the right to take into consideration the purchase prices of new furniture at the time of the sale and at the time of the fire, and make such allowance for depreciation as they thought the evidence warranted.

SMITH and DOWLING, JJ., dissent, with opinion.

APPEAL by the defendant, Spear and Company, from a determination and order of the Appellate Term, entered in the office of the clerk of the county of New York on the 10th day of December, 1919, affirming a judgment of the City Court of the City of New York.

Alfred A. Walter of counsel [*Edwin R. Wolff* with him on the brief; *Walter, Wolff & Fertig*, attorneys], for the appellant.

Gilbert M. Levy of counsel [*Cohen Brothers*, attorneys], for the respondent.

PAGE, J.:

The plaintiff purchased from the defendant, a dealer in furniture, certain household furniture for the purchase price of \$909.25 of which \$100 was paid on account and two chattel mortgages given to the defendant to secure payment of the balance which was to be paid in monthly installments. The plaintiff had paid in all \$295 including the May installment. In May, 1918, the plaintiff, desiring to remove from the city for the summer months, applied to the defendant for leave to remove and store the furniture pursuant to the requirements of agreement of sale. He saw McGrath, the defendant's credit man, through whom the plaintiff had purchased the furniture. McGrath arranged with the plaintiff to store the furniture in the defendant's warehouse, and agreed to store it free of charge. The furniture was removed to the defendant's warehouse and on June 15, 1918, was destroyed by fire. This action was brought to recover the sum of \$295, the value of plaintiff's interest in the furniture over and above the unpaid amount of the chattel mortgages of the defendant upon an alleged agreement of the defendant to obtain insurance on the furniture against loss by fire, which defendant failed to perform. The defendant denied the making of such agreement and upon trial denied McGrath's authority to make the agreement to obtain insurance on the furniture. It is further argued on this appeal that such agreement was without consideration.

McGrath made the agreement to store the furniture, as agent for the defendant, and the defendant accepted the goods and stored them without compensation and did not suggest that he did not have power to make that agreement. It was within the apparent scope of his authority to make any agreement that might relate to such storage. The insurance of the property during storage was suggested by him. Plaintiff's evidence, which was accepted by the jury, was that when the plaintiff said he would have the furniture insured by an agent of his acquaintance, McGrath offered to take out the insur-

ance, as the defendant, having a large amount of insurance, could secure it cheaper, and to send the bill for the premium with the bill for the June installment. The plaintiff's abandonment of his purpose to insure, in reliance on the defendant's promise, was a sufficient consideration for the defendant's promise. Furthermore, both had an interest in the property and the insurance was for their mutual benefit. This alone would have supported the promise to insure. The jury returned a verdict for the plaintiff for \$275. He was entitled to receive as his damage the value of the furniture, less the amount he owed the defendant on account of the purchase price. There was no proof that the plaintiff had actual notice that the defendant had not insured the furniture. No demand had been made for the payment of the June installment, and notice cannot be implied from failure to send a bill for the premium. Under such circumstances, the measure of damage is the value of the property up to the amount of insurance which the defendant was to procure. (*Marconi Wireless Tel. Co. v. Universal T. Co., Inc.*, 194 App. Div. 272.) The plaintiff testified that McGrath said he would take out insurance for the full amount. While the furniture had been in use, there was evidence that it was in first class condition and not marred or scratched. The price of furniture had increased since the purchase of this furniture fifty or seventy-five per cent, according to defendant's testimony. For these reasons, defendant's criticism that there was nothing in the proof to justify the amount of the verdict is unwarranted. The question was one of value, and the jury had the right to take into consideration the purchase price of new furniture at the time of the sale and at the time of the fire, and make such allowance for depreciation as they thought the evidence warranted.

The determination of the Appellate Term should be affirmed, with costs.

CLARKE, P. J., and GREENBAUM, J., concur; DOWLING and SMITH, JJ., dissent.

SMITH, J. (dissenting):

I am unable to find any consideration for the promise upon which plaintiff has recovered. In the prevailing opinion

consideration is found, first, in the abandonment of the plaintiff's purpose to insure in reliance upon defendant's promise to procure the insurance. This is an application of what is spoken of in the text books as a promissory estoppel. In Williston on Contracts (§ 139) the doctrine is discussed, and it is there said: "Doubtless there are reasons of justice for enforcing promises which have led the promisee to incur any detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise. Students of the Civil Law usually select the technicalities of the English and American law requiring consideration to validate a simple contract, for particular animadversion; and there is not infrequently observable in the decisions of American courts in cases of hardship an impatience with the requirement and an effort to enlarge the boundaries of enforceable promises. If this sentiment should find general expression, it may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise — rather than the more modern notion of purchase of a promise for a price, and that it is a consistent development from this early basis to define valid consideration as any legal benefit to the promisor or legal detriment to the promisee given or suffered by the latter in reasonable reliance on the promise. Such a definition eliminates the necessity of a request by the promisor for the consideration. The proposition is by no means without intrinsic merit, but it should be recognized that if generally applied it would extend liability on promises, *and that at present it is opposed to the great weight of authority.* A class of cases where a genuine estoppel exists must be distinguished from those discussed in this section."

In Story on Contracts (5th ed. § 548) the rule is stated: "But in order to render an injury to the promisee a good consideration, it must be an injury upon entering into the contract and not from the breach of it." (See *Ridgway v. Grace*, 2 Misc. Rep. 293; *Korn v. Weir*, 88 N. Y. Supp. 976.)

The plaintiff was abandoning his apartment. The defendant stored the goods upon which it had a chattel mortgage as a gratuitous bailee, for which it was to charge no compensa-

tion. In the bill of sale originally given of the property was a notice to the plaintiff *for his own protection* to have the furniture insured against loss by fire. In the chattel mortgage returned to the defendant was a provision requiring the consent of the defendant to the removal of the goods at any time. The promise sued upon was not to insure the goods for the benefit of the defendant or of the parties jointly. The plaintiff had held the property for nine months and had placed no insurance whatever upon the property. I am unable to find as a consideration of the promise any benefit to the promisor or detriment to the promisee other than the failure to insure in reliance upon the defendant's promise, which, under the authorities cited, constitutes no consideration for the promise "under the great weight of authority." The answer to the plaintiff's claim of consideration would seem to be that the plaintiff was not authorized to rely upon the defendant's promise to insure, made without consideration.

In the prevailing opinion further consideration is found in the fact that both the plaintiff and defendant were jointly interested in the property. Neither in the bill of sale nor in the chattel mortgage was there any agreement of the plaintiff to insure the property for the benefit of the defendant and the suggestion contained in the bill of sale was that the plaintiff insure the property for his own benefit alone. The defendant apparently relied upon the responsibility of the plaintiff and was satisfied therewith. The defendant had the right to insure its own interest in the property independently of any interest of the plaintiff. To promise to insure, therefore, as alleged and proven gives no benefit to the defendant, nor was there any legal detriment to the plaintiff requested as "the price of the promise." The promise, therefore, made without price, created no legal obligation on the part of the defendant and for the violation thereof the plaintiff has no right of action.

The judgment should be reversed and judgment directed for the defendant upon its counterclaim.

DOWLING, J., concurs.

Determination affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM RAND, Respondent, v. CHARLES L. CRAIG, as Comptroller of the City of New York, Appellant.

First Department, March 4, 1921.

Attorney-General — Special Deputy Attorney-General — power and authority of Attorney-General to fix amount of remuneration for special deputy appointed to act in New York county — claim not subject to audit by city comptroller — what constitutes fixation of compensation — Executive Law, sections 61 and 62, subdivision 2, construed — Greater New York charter, section 1583, construed.

The compensation of a special deputy appointed by the Attorney-General under subdivision 2 of section 62 of the Executive Law, to act in New York county, may be fixed by the Attorney-General and is not subject to audit by the city comptroller.

The provisions of section 61 of the Executive Law, as amended, to the effect that the Attorney-General is given power to "appoint such deputies as he may deem necessary and fix their compensation within amounts appropriated by the Legislature," simply applies to salaries which are to be paid by the State, and does not limit compensation to be paid to a Deputy Attorney-General by a county in which work is performed.

In such case the approval by the Attorney-General of the amount of a bill rendered is in law a fixation of compensation *pro tanto* within the meaning of the foregoing statute.

Section 1583 of the Greater New York charter, which provides that all county charges "shall be audited," does not apply to a claim for compensation by a Special Deputy Attorney-General appointed by the Attorney-General who fixes the compensation of the deputy.

PAGE and GREENBAUM, JJ., dissent, the latter with opinion.

APPEAL by the defendant, Charles L. Craig, as comptroller of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of October, 1920, granting relator's motion for a peremptory writ of mandamus requiring the defendant, as comptroller of the city of New York, to draw his warrant to the amount of \$15,000 payable to relator.

John F. O'Brien of counsel [George P. Nicholson and Russell Lord Tarbox with him on the brief; John P. O'Brien, Corporation Counsel], for the appellant.

Nathan A. Smyth, for the respondent.

SMITH, J.:

Upon July 11, 1919, the Governor appointed an Extraordinary Trial Term of the Supreme Court for New York county and designated Mr. Justice WEEKS to hold the term and to cause the grand jury to be drawn and to serve. The term convened upon August 11, 1919. On February 19, 1920, the Governor, pursuant to section 62 of the Executive Law, required the Attorney-General to attend in person or by deputy at such term and in place and stead of the district attorney of New York county, to exercise all the powers and perform all the duties conferred upon him by section 62 of the Executive Law. On March 12, 1920, the Attorney-General appointed William Rand the Special Deputy Attorney-General, and directed him to conduct all proceedings before the grand jury and before the court which the Attorney-General had been authorized by the Governor to conduct personally or by deputy. It thus appears that the relator Rand was duly appointed as Deputy Attorney-General to act for and in the place of the Attorney-General under subdivision 2 of section 62 of the Executive Law (as amd. by Laws of 1911, chap. 14). That subdivision reads as follows: "Whenever required by the Governor, attend in person, or by one of his deputies, any term of the Supreme Court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury such criminal actions or proceedings as shall be specified in such requirement; in which case the Attorney-General or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the Attorney-General or the Deputy Attorney-General so attending. In all such cases all expenses incurred by the Attorney-General, including the salary or other compensation of all deputies employed, shall be a county charge."

Upon July 3, 1920, a bill was presented to the city of New York by the said Rand for the sum of \$15,000 on account of services rendered pursuant to this appointment. At the foot

of said bill appears: "The foregoing voucher is approved this 8th day of July, 1920, Charles D. Newton, Attorney-General." The comptroller does not question the liability of the city of New York to pay a reasonable sum for the services of the said relator pursuant to this appointment by the Attorney-General. His claim is that the relator's bill is subject to audit by himself, while the relator claims that the city is required to pay any sum fixed as his compensation by the Attorney-General, irrespective of the actual value of the services rendered.

The power of the Attorney-General to fix the compensation of the relator is claimed under section 61 of the Executive Law. That section (as amd. by Laws of 1911, chap. 204) formerly gave to the Attorney-General the power to "appoint such deputies as he may deem necessary and fix their compensation." In 1919, by chapter 165, there was added to this provision the following clause "within amounts appropriated therefor by the Legislature." Confessedly the relator has not shown that any appropriation had been made sufficient to cover his compensation, and it is further conceded that this section contains the only provision of law which authorizes a fixation of the compensation of a Deputy Attorney-General by the Attorney-General himself. The relator contends that this amendment of 1919 simply applies to the compensation of those deputies who are to be paid by the State, while the comptroller contends that the power of fixation given by the section as amended is limited to the compensation of such deputies as are paid by the State and does not apply to deputies who may be necessarily appointed for special work under subdivision 2 of section 62 of the Executive Law.

By section 149 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1917, chap. 401) all contracts of counties within the territorial limits of the city of New York made with any public officer or contracts of the county of New York made with a public officer acting in its behalf are made subject to audit and revision by the department of finance. It is further provided that the power so given to settle and adjust such claims shall not be construed to authorize the comptroller to dispute the amount of any

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salary established by or under the authority of any officer or department authorized to establish the same.

By section 1583 of the Greater New York charter, although the heading of the section seems to refer simply to salaries of county officers, it is provided that all county charges *shall be audited* and paid by the department of finance out of the fund or appropriation applicable thereto. Unless, therefore, the power of the Attorney-General to fix the compensation of the deputies appointed under subdivision 2 of section 62 of the Executive Law, without legislative appropriation therefor, is given by section 61 of the Executive Law, the contention of the comptroller must prevail and the mandamus was improperly issued.

The main question for determination, therefore, is presented, whether under section 61, as amended, the power to fix the compensation of deputies so appointed exists with the Attorney-General without legislative appropriation therefor.

Prior to 1919 the right of the Attorney-General to fix such compensation would seem to me to be clearly given by section 61 of the Executive Law as the section then read. The duties to be performed by this deputy only could be performed by a deputy duly authorized and not by counsel employed, inasmuch as only such deputies are authorized to appear before the grand jury. Section 61 as it read prior to 1919 contained no limitation as to the deputies whose compensation was authorized to be fixed by the Attorney-General, and it would seem plain that the power so to fix the compensation of deputies was intended to include the power to fix the compensation of deputies appointed under subdivision 2 of section 62.

What effect then should be given to the amendment of section 61 by chapter 165 of the Laws of 1919. Prior to the enactment of this statute the Deputy Secretary of State was paid under the statute a salary of \$4,000. (Executive Law, § 21.) By this statute it was provided that such deputy should receive an annual salary to be fixed by the Secretary of State within the amount appropriated therefor by the Legislature. Prior to that statute the Deputy Comptrollers received salaries fixed by the statute. (Executive Law, § 41, as amd. by Laws of 1911, chap. 568.) By chapter 165 of the Laws of 1919 these deputies were to receive salaries to be fixed by

the Comptroller within amounts appropriated therefor by the Legislature. Prior to that statute the Deputy Treasurer received a statutory salary. (Executive Law, § 52, as amd. by Laws of 1909, chap. 268.) By that statute the Deputy Treasurer was to receive an annual salary to be fixed by the Treasurer within the amount appropriated therefor by the Legislature. Prior to that statute the Deputy State Engineer received a statutory salary. (Executive Law, § 71.) By that statute [the salary of the Deputy State Engineer was to be fixed by the State Engineer within the appropriation allowed by the Legislature. The same provision, then, was inserted in section 61 of the Executive Law, governing the appointment of Deputy Attorneys-General, and while prior to the statute the salaries of such deputies were to be fixed by the Attorney-General, the same clause was added, that such compensation should be within the amounts appropriated therefor by the Legislature. When the full scope of the act of 1919 is thus considered, it will be seen that there was a general scheme to allow all State officers appointing deputies to be paid by the State, themselves to fix their salaries, but within the limitations of the appropriation made by the Legislature. When the history of this statute is considered and apparent purpose as indicated in reference to the fixation of salaries of deputies of other State officers, the intention is to my mind clearly indicated that the limitation upon section 61 as to the fixation of salary of Deputy Attorneys-General was a limitation which simply applied to the salaries which were to be paid by the State and that such limitation did not apply to the Deputy Attorneys-General whose compensation was to be paid by the county in which their work was to be performed. Any other construction would create complications which seem to me clearly to indicate the intention thus expressed. There is no power given under subdivision 2 of section 62 to appoint special deputies for the purpose of that work. The power must exist, if at all, under section 61, and if it be held that the power is there limited to the appointment of such deputies as can receive their salaries only within the appropriation allowed by the State, the power of the Attorney-General to appoint deputies for this special work would be circumscribed, if not practically nullified. But by

subdivision 2 of section 62 the Governor *may require* the Attorney-General to appear by himself or deputy, although a public exigency may call for similar work by the Attorney-General in many counties of the State during the year. There is no apparent reason for limiting the right of the Attorney-General in the appointment of deputies to those whose compensation may come within the amount appropriated by the Legislature when their compensation is made a county charge and is not a State charge. The law should not be so construed as to embarrass the Governor or the Attorney-General in executing the provisions of subdivision 2 of section 62, by limiting the right of appointment of the Attorney-General to those only whose compensation is provided for by legislative appropriation. It is further argued that this amendment, while not limiting the power of appointment of a Deputy Attorney-General, limits the power of fixation of compensation to the amount of the legislative appropriation. Here, again, the history and purpose of the enactment of the amendment of 1919 must be considered. If we construe section 61 as it read prior to the enactment of the act of 1919 to authorize the appointment of such deputies as the Attorney-General may deem necessary and to fix their compensation, the amendment should not be deemed any more a limitation upon the power of the Attorney-General to fix the compensation of deputies, executing the powers conferred by subdivision 2 of section 62, than to the appointment itself of such deputies. If I am right in my construction of the amendment of 1919 as affecting deputies only whose compensation is to be paid by the State as to the deputies appointed under subdivision 2 of section 62, whose compensation is to be paid by the county, section 61 must be read as before the amendment made by the Laws of 1919. This construction would give the power to the Attorney-General not only to appoint this relator as deputy, but to fix his compensation.

Another consideration is presented which bears somewhat upon the interpretation to be given to this amendment of 1919. These investigations by extraordinary terms with extraordinary grand juries are in a nature indefinite, both as to time and the amount of work necessarily involved. It would be practically impossible for the Legislature to make any

appropriation therefor before the performance of the work. It cannot be anticipated what may be the extent of the services which a deputy thus appointed may be called upon to perform. This situation should not be lost sight of in connection with the other considerations presented in interpreting the meaning of the amendment of section 61.

It is further argued that this fixation of compensation must be made before the performance of the services, and an approval of payment on account is not such a fixation. To this I cannot agree, by reason of the nature of those services. The services may extend over many months. If the Attorney-General had power to fix the compensation he would seem to have power to fix the compensation for services already performed, even though the work be not finished. An approval by the Attorney-General of the amount of a bill rendered is in law as I deem it a fixation of compensation *pro tanto* within the meaning of the statute.

These views seem to be in accord with the opinion of the Second Department in *People ex rel. Osborne v. Board of Supervisors* (168 App. Div. 765).

Again, it is contended that this construction should not be given to the statute, because of the danger of its abuse by the fixation of salaries of deputies so employed at an exorbitant amount. If the construction herein given to the statute prior to the amendment in 1919 be the proper construction, then such liability to abuse has existed for many years in this State without evidence of any harm resulting therefrom. The argument, thus made by the comptroller, should be addressed to the Legislature rather than to the court.

The order should, therefore, be affirmed, with ten dollars costs and disbursements.

CLARKE, P. J., and DOWLING, J., concur; PAGE and GREENBAUM, JJ., dissent.

GREENBAUM, J. (dissenting):

Under subdivision 2 of section 62 of the Executive Law (as amd. by Laws of 1911, chap. 14), whenever required by the Governor, it becomes the duty of the Attorney-General, in person or by one of his deputies, to perform the duties

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ordinarily performed by the district attorney of a given county with respect to "such criminal actions or proceedings as shall be specified" by the Governor. The concluding paragraph of subdivision 2 reads as follows: "In all such cases all expenses incurred by the Attorney-General, including the salary or other compensation of all deputies employed, shall be a county charge."

In the absence of legislative authority in the Attorney-General to fix compensation of deputies assigned to special services under subdivision 2 of section 62 of the Executive Law, it would seem to follow, in case a deputy under regular appointment with a stated salary were assigned to perform the duties required by the Governor, that then the time devoted by such deputy to such services would be estimated upon the basis of his salary and the time consumed in performing the duties of district attorney. In case, however, of the appointment of a special deputy, who is not under salary, I am of opinion, in the absence of the approval of the local authorities of the bill submitted by a special deputy, that the latter would be entitled to compensation for services based upon a *quantum meruit* which he could enforce by action.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NATHAN A. SMYTH, Respondent, v. CHARLES L. CRAIG, as Comptroller of the City of New York, Appellant.

First Department, March 4, 1921.

Attorney-General — power to fix compensation for services rendered to Attorney-General as counsel in New York city before appointment as deputy — claim is subject to audit by comptroller of city under Greater New York charter, section 1583.

A claim for compensation as counsel to the Attorney-General prior to an appointment as Special Deputy Attorney-General to act in New York city, cannot be fixed by the Attorney-General, but must be audited by the city comptroller as provided by section 1583 of the Greater New York charter. PAGE and GREENBAUM, JJ., dissent, the latter with opinion.

APPEAL by the defendant, Charles L. Craig, as comptroller of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of October, 1920, granting relator's motion for a peremptory writ of mandamus requiring him to draw his warrant for the compensation of the relator.

John F. O'Brien of counsel [*George P. Nicholson* and *Russell Lord Tarbox* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellant.

Isidor J. Kresel, for the respondent.

SMITH, J.:

The bill as rendered for which the warrant is directed is for \$6,500; \$6,000 thereof is for services rendered after relator had been appointed Deputy Attorney-General; \$500 thereof is for services rendered to the Attorney-General as counsel prior to the appointment of the relator as a deputy. As to the services rendered as Deputy Attorney-General the appeal should be determined as announced in the case of *People ex rel. Rand v. Craig* (195 App. Div. 850), the decision of which is handed down herewith. As to the services rendered as counsel to the Attorney-General, I find no legislative authority to the Attorney-General to fix the compensation thereof at \$500. Therefore, I think the claim is subject to the audit of the comptroller. The order should, therefore, be modified so as to direct the comptroller to draw his warrant for the sum of \$6,000, and as modified affirmed, without costs.

CLARKE, P. J., and DOWLING, J., concur; PAGE, J., dissents as to the compensation after appointment as Deputy Attorney-General; GREENBAUM, J., dissents with an opinion, which is printed on page 856.

Order modified as directed in opinion and as so modified affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ROBERT E. MANLEY, Respondent, v. CHARLES L. CRAIG, as Comptroller of the City of New York, Appellant.

First Department, March 4, 1921.

See head note in *People ex rel. Smyth v. Craig* (ante, p. 857).

APPEAL by the defendant, Charles L. Craig, as comptroller of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of October, 1920, granting relator's motion for a peremptory writ of mandamus requiring him to draw his warrant to the amount of \$4,000 payable to the relator.

The bill as rendered for which the warrant is directed is for \$4,000; \$2,500 is for services rendered after relator had been appointed as Deputy Attorney-General; \$1,500 thereof is for services rendered to the Attorney-General as counsel prior to the appointment of relator as a deputy.

John F. O'Brien of counsel [*George P. Nicholson* and *Russell Lord Tarbox* with him on the brief; *John P. O'Brien, Corporation Counsel*], for the appellant.

Isidor J. Kresel, for the respondent.

SMITH, J.:

This case presents the same situation as is presented in the case of *People ex rel. Smyth v. Craig* (195 App. Div. 857), and the order should be modified in accordance with the opinion in that case so as to require the comptroller to draw warrant for the sum of \$2,500 payable to the relator, and as modified should be affirmed, without costs.

CLARKE, P. J., and DOWLING, J., concur; PAGE, J., dissents; GREENBAUM, J., dissents with an opinion, which is printed on page 856.

Order modified as directed in opinion and as so modified affirmed, without costs.

MARY UDOVICHKY, Appellant, v. JORDAN BACHEFF,
Respondent.

First Department, April 1, 1921.

Libel — slander not pleadable as counterclaim or defense.

In an action for libel slander cannot be pleaded as a counterclaim, a defense, or a partial defense in mitigation.

APPEAL by the plaintiff, Mary Udovichky, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of December, 1920, denying plaintiff's motion for judgment on her demurrer to certain defenses and counterclaims, brought on and tried as a contested motion under section 976 of the Code of Civil Procedure.

Leonard Klein, for the appellant.

Rosalie F. Janoer, for the respondent.

LAUGHLIN, J.:

The action is for libel in maliciously composing and mailing to the plaintiff's husband a letter reflecting on her chastity. The amended answer puts in issue the allegations of the complaint with respect to the plaintiff's marriage and those charging that he composed and mailed the letter and his purpose in so doing, and pleads one separate and distinct defense, two partial defenses by way of mitigation, two separate and distinct defenses and the same facts by way of mitigation, one separate and partial defense by way of mitigation, and six separate and distinct defenses and counterclaims combined. The plaintiff demurred to each of the six combined defenses and counterclaims on the grounds that as defenses they were insufficient and as counterclaims they were unauthorized, in that they did not grow out of the transaction set forth in the complaint, and are not connected with the subject of the action; and also that they fail to state facts sufficient to constitute a cause of action. The appeal, therefore, relates only to the six combined defenses and counterclaims. The

counterclaims are all for slander. The complaint alleges that the libelous letter was written and mailed on or about the 14th day of August, 1920. In each of the first three counterclaims the defendant charges that the plaintiff slandered him the latter part of July, the fore part of August and in the month of September, 1920, respectively, by maliciously and falsely charging in the presence and hearing of divers persons that he kept his wife, who was a sane woman, in an insane asylum "to rid himself of her." In the other three counterclaims the plaintiff is charged with having maliciously and falsely stated in the presence and hearing of divers persons at three different specified times, which correspond as to dates with those referred to in the other counterclaims, that the defendant cohabited with his daughter. It is unnecessary to consider whether the counterclaims are sufficient in law, for it is quite plain that they are not authorized by section 501 of the Code of Civil Procedure. The complaint is in tort and none of the counterclaims purports to state a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or a cause of action connected with the subject of the action, which is the alleged libel. It is not even pleaded that the libel was provoked by the slanders, and manifestly it could not have been provoked by the slanderous words alleged to have been uttered after its publication; but by thus drawing attention to the absence of any allegation tending to show any connection between the slanders and the libel, I do not wish to be understood as implying that the counterclaims would have been proper if it had been alleged that the libel had been provoked by the slanderous utterances of the plaintiff. (See *Sheehan v. Pierce*, 70 Hun, 22; *Rothschild v. Whitman*, 132 N. Y. 472; *Prosser v. Carroll*, 33 Misc. Rep. 428.)

It is difficult to understand on what theory it is claimed that these alleged slanders of the defendant by the plaintiff constitute a defense to the action for libel. Plainly the alleged slanders subsequent to the libel could in no view constitute a justification therefor; and with reference to those which preceded the libel, it is not even charged that the libelous letter was written in answer thereto or was provoked thereby. (See *Maynard v. Beardsley*, 7 Wend. 560; *Lee v.*

Woolsey, 19 Johns. 319.) The slanders are pleaded as complete defenses and not in mitigation, but they would not even constitute a partial defense in mitigation. (*Hess v. New York Press Co.*, 26 App. Div. 73.)

The order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,
concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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ORMSBY MCHARG, Respondent, v. COMMONWEALTH FINANCE CORPORATION and Others, Defendants.

LAURENCE MCGUIRE and JAMES E. LANDY, Appellants.

First Department, April 1, 1921.

Corporations — receivers — jurisdiction to appoint receiver of foreign corporation — action by stockholder for accounting and appointment of receiver — stipulation between parties discontinuing action without costs — plaintiff personally liable for services and expenses of receivers.

The courts of this State have jurisdiction to intervene in behalf of stockholders of a foreign corporation and, through a receivership of the property within the jurisdiction of the court, to preserve the assets of the corporation against waste, unlawful diversion or mismanagement.

In an action by a stockholder of a foreign corporation in the right of the company for an accounting by the directors for acts of waste and negligence and for the appointment of receivers, in which receivers were appointed who entered on their duties and incurred expenses but were restrained from taking possession of the property of the defendant, the plaintiff is personally liable for the services, disbursements and counsel fees of the receivers, where he entered into a stipulation with the defendants to discontinue the action without costs and to have the order appointing the receivers vacated, and moved on notice to the receivers only for an order of discontinuance. His liability rests not only on the ground of the stipulation whereby he relieved the defendants of liability but also on the ground that the defendants did not have notice of the application. Neither the corporation nor the individual defendants can be compelled to bear the expenses of the receivership without proof that the facts warranted the appointment of the receivers; that issue was not determined.

APPEAL by Laurence McGuire and another, as receivers of the defendant Commonwealth Finance Corporation, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of February, 1921, discontinuing the action without making any provision for the payment of the expenses of said receivership and the compensation of said receivers.

John J. Kirby of counsel [*John Delahunty*, attorney], for the appellants.

Benjamin F. Schreiber of counsel [*Alfred Rathheim* with him on the brief; *Benjamin F. Schreiber*, attorney], for the respondent.

LAUGHLIN, J.:

This is an action by a stockholder of the defendant company, which is a foreign corporation, in the right of the company for an accounting by the directors for acts of waste and negligence, and for the appointment of receivers, and for an injunction restraining the directors from interfering with the possession of the receivers.

The action was commenced on the 10th of September, 1920. Defendants all appeared and joined issue on some of the material allegations of the complaint. Plaintiff thereafter moved for the appointment of a receiver of the property of the corporation within this jurisdiction, and the appellants were duly appointed receivers on the 11th of December, 1920, and they duly qualified that day and filed an undertaking in the sum of \$100,000, as required by the order appointing them, which was duly approved as provided in the order, and they incurred liability for or paid a premium of \$500 therefor. The receivers entered upon the performance of their duties and employed and consulted with an attorney and proceeded to take charge of the property of the company, but on arriving at its place of business were advised that an order to show cause containing a stay of proceedings on the order appointing them as receivers had been granted by one of the associate justices of this court, and later on such an order was served on them. It required them to show cause why the stay should

not be continued, pending the appeal from the order appointing the receivers. Thereupon, with the consent and approval of the attorney for the plaintiff, they employed counsel to represent them on the return of the order and advised with him. Their attorney and counsel appeared and represented them on the return day of the order to show cause. The stay was continued pending the appeal from the order. In the meantime, a similar action was brought by one Canham, a stockholder of the company, in his own behalf and in behalf of all other stockholders similarly situated, and the plaintiff therein is represented by the attorney who is the attorney of record for the plaintiff herein, and a motion was made therein for the appointment of ancillary receivers and the motion was granted; but the order appointing the receivers had not been entered when the order now under review was made. The plaintiff on affidavits made by himself and his attorney showing these facts, and on a stipulation signed by the attorneys for all the parties to the action to the effect that this action might be discontinued without costs to any party against the other, that the order appointing the receivers might be vacated and set aside, that the undertaking filed by the receivers might be canceled and discharged, and that the receivers might be discharged, and that the notice of appeal from the order appointing the receivers might be withdrawn and the appeal dismissed, and that an order to that effect might be entered without notice, moved on notice to the receivers and to their attorney for the order of discontinuance and for the other relief specified in the stipulation. The motion was opposed by the receivers on an affidavit made by one of them and another by their attorney, showing the services they had rendered and the expenses they had incurred, and praying that the value of their services and the amount of their disbursements and a reasonable allowance for the services of their attorney and counsel be ascertained and that the plaintiff be required to pay the same. Their objection to the discontinuance of the action without any provision being made for payment for their services and for reimbursing them for their expenses and providing an allowance for their attorney and counsel was overruled on the ground, as shown by the memorandum opinion, that there was no authority for requiring such

payment by the plaintiff, and that inasmuch as the company had no notice of the motion, payment could not be required by it.

Without regard to whether a domiciliary receiver of a foreign corporation has been appointed, the courts of a State in which the corporation has property have jurisdiction to intervene in behalf of stockholders and, through a receivership of the property within the jurisdiction of the court, to preserve the assets of the corporation against waste, unlawful diversion or mismanagement; and, therefore, even though plaintiff improperly invoked the jurisdiction of the court, there was jurisdiction to appoint the receivers. (*Goss v. Warp Twisting In Machine Co.*, 133 App. Div. 122; *Hallenborg v. Greene*, 66 id. 590; *MacNabb v. Porter Air-Lighter Co.*, 44 id. 102; *Woerisheffer v. North River Construction Co.*, 6 Civ. Proc. Rep. 113; *affd.*, 99 N. Y. 398; *Maben v. Ongley Electric Co.*, 156 id. 196.) Of course, payment could not be required of the defendant company or the individual defendants, not only on the ground that they had no notice of an application for such relief, but because the plaintiff had stipulated with them that the order appointing the receivers be vacated and the appeal withdrawn and the receivers discharged and their bond canceled, and the action might be discontinued without costs. There was no determination of the issues on the merits, and manifestly neither the corporation nor the individual defendants could be compelled to bear the expenses of the receivership without proof that the facts warranted the appointment of the receivers. That was an issue presented by the pleadings, but the plaintiff in his desire to discontinue the action withdrew the issue without any adjudication thereon. The other theory, however, on which the request of the receivers was disregarded plainly is erroneous. The receivers were officers of the court and they were appointed as such at the instance of the plaintiff, who presented facts showing a *prima facie* case for their appointment. It is the duty of the court to protect and enforce the rights of its receivers. If the action had been continued and the theory on which they were appointed was sustained, their expenses and their commissions would come out of the funds of which they were given the custody; but where, as here,

plaintiff relieves the corporation and other defendants from all liability by stipulating for a discontinuance, he personally thereby assumes responsibility for the payment of the services and disbursements of the receivers, and the value and amount thereof may be determined by the court by a reference and he should be required to pay the same. (*Willis v. Sharp*, 12 N. Y. Supp. 120; *Weston v. Watts*, 45 Hun, 219; *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321-331; *Erwin v. Collier*, 2 Mont. 605; *McAnrow v. Martin*, 183 Ill. 473; *Horn v. Bohne*, 96 Md. 8; *Ogden City v. Bear Lake & River Water-Works & Irr. Co.*, 52 Pac. Rep. 697; *City of St. Louis v. St. Louis Gaslight Co.*, 11 Mo. App. 237; High Receivers, §§ 796, 796-a, 805, 809-a; 34 Cyc. 352.)

It follows that the order should be modified, with ten dollars costs and disbursements to appellants, by adding after the last paragraph thereof a new paragraph as follows: "And it is further ordered that the plaintiff pay to the receivers reasonable compensation for their time and services and their necessary disbursements and the reasonable value of the services of their attorney and counsel and that a referee be appointed to take evidence with respect thereto and report the same together with his opinion thereon and that the action shall be deemed continued for those purposes only until the payment by the plaintiff of such compensation, disbursements and expenses when determined by the court and the costs of the appeal and ten dollars costs for opposing the motion and the costs of the reference, but shall be deemed discontinued as against the defendants," and the matter is remitted to the Special Term for the appointment of a referee and the further steps specified.

DOWLING, SMITH, MERRELL and GREENBAUM, JJ., concur.

Order modified, with ten dollars costs and disbursements to appellants, by adding the provision stated in opinion, and the matter remitted to the Special Term for the appointment of a referee and the further steps specified. Settle order on notice.

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First Department, April, 1921.

EDWARD D. LOUGHMAN, Appellant, v. CHARLOTTE H. LILLIENDAHL, Respondent.

First Department, April 1, 1921.

Landlord and tenant — possessory remedies — injunction granted to restrain summary proceedings pending suit for specific performance of an agreement to renew lease — adequate remedy could not be afforded plaintiff in summary proceedings in Municipal Court of City of New York — summary proceedings tried after denial of injunction — injunction order not issued on appeal — leave to apply for injunction if judgment in summary proceedings reversed.

Summary proceedings instituted in the Municipal Court of the City of New York to dispossess the plaintiff at the termination of the lease will be restrained in a suit by the plaintiff to compel specific performance of an agreement to renew the lease, for while plaintiff could defend the summary proceedings on the ground on which he claims to be entitled to equitable relief in this action, the Municipal Court was without jurisdiction to require the defendant herein to execute a renewal or extension of the lease and, therefore, plaintiff had no adequate remedy.

As it was claimed that the injunction was sought for delay, the motion therefor should have been granted on condition that the plaintiff, at the election of the defendant, stipulate for a reference and immediate trial. The issues in the summary proceeding having been tried and decided in favor of the defendant herein after plaintiff's motion for an injunction was denied, it is too late to enjoin the summary proceeding in its present status, but the defendant is entitled to have the order denying his motion for an injunction reversed and to recover costs and disbursements of the trial and the costs of the motion for the injunction.

The injunction order may be hereafter issued only upon the application of the plaintiff, which may be *ex parte*, on proof that the final order in summary proceedings has been reversed or vacated, and upon plaintiff's filing a stipulation for a reference and immediate trial.

APPEAL by the plaintiff, Edward D. Loughman, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of January, 1921, denying plaintiff's motion for an injunction *pendente lite* from prosecuting a summary proceeding instituted in the Municipal Court of the City of New York, Seventh District, Borough of Manhattan, for the removal of the plaintiff from certain premises as a holdover tenant.

James S. Darcy of counsel [*Loughman & Bailey*, attorneys], for the appellant.

Joseph R. Swan of counsel [*Swan, Moore & Danforth*, attorneys], for the respondent.

LAUGHLIN, J.:

This action is for the specific performance of an agreement contained in a written lease executed by the parties on the 16th day of October, 1917, whereby the defendant, as landlord, agreed to renew the lease, which was of a private one-family house, known as 630 West One Hundred and Fifty-eighth street, for a period of from one to five years from November 1, 1918, at the election of the plaintiff. The plaintiff alleges that he duly exercised his option for the renewal of the lease for the period of three years; but that the defendant has failed and refused to execute a renewal lease for that period, although due demand therefor has been made, and that the defendant claims that the plaintiff's right to occupy the premises will expire on the 31st of October, 1920, and is offering the premises for sale and threatens to remove the plaintiff therefrom.

The relief demanded is the execution of the renewal or the extension of the lease and an injunction *pendente lite* against dispossession proceedings or an ejectment action. The action was commenced on or about the 2d of July, 1920. On the 4th of January, 1921, the defendant instituted the summary proceeding for the removal of the plaintiff on the ground that he was holding over after the expiration of his term, and in order to comply with the requirements of chapter 942 of the Laws of 1920 (adding to Code Civ. Proc. § 2231, subd. 1-a), it was further alleged in the petition that the landlord was desirous in good faith of obtaining possession of the premises for immediate personal occupation as a dwelling by herself and her family. The plaintiff thereupon applied for a temporary injunction restraining the prosecution of the summary proceeding pending the trial and decision of the issues herein. He could defend against the summary proceeding on the ground on which he claims to be entitled to equitable relief in this action; but the Municipal Court was without jurisdiction to require the defendant to execute a renewal or extension of the lease. Since the Municipal Court

could not afford the plaintiff adequate relief, the summary proceeding should have been enjoined, and the plaintiff should have been protected against a dispossession proceeding or an ejectment action pending the trial and decision of the issues herein, upon the determination of which his right to a renewal or extension of the lease depends. (*Rodgers v. Earle*, 5 Misc. Rep. 164; *Van Reimpst v. Weiher*, 131 App. Div. 824; *Becker v. Church*, 115 N. Y. 562; *Metropolitan Trust Co. v. Stallo, No. 1*, 166 App. Div. 639; High Inj. [4th ed.] §§ 48, 49; *Smith v. First National Bank*, 151 App. Div. 317; *Graham v. James*, 7 Robt. 468; *Crawford v. Kastner*, 26 Hun, 440.) It is further to be observed that the summary proceeding might be unsuccessful through the failure of the landlord to show a compliance with the provisions of said chapter 942, and in that event there would be no determination of the issue with respect to the agreement for a renewal. It thus appears that in any event it would be necessary for the plaintiff, even if successful in defending against the summary proceeding, to obtain the complete relief to which he claims to be entitled, to have the issues herein tried. Doubtless the court was led to deny the motion by an affidavit charging that the order was sought for delay; but we think the motion should have been granted on condition that the plaintiff at the election of the defendant stipulate for a reference and immediate trial.

It appears by the papers on a motion made in behalf of the respondent returnable at the time the appeal was argued, that since the denial of the motion for an injunction issue was joined in the summary proceeding and the issues were tried and decided in favor of the respondent, and that the appellant herein has appealed therefrom to the Appellate Term, it is, therefore, now too late to enjoin the summary proceeding in its present status. The Code of Civil Procedure (§ 2262) provides a remedy for a stay of the execution of the warrant in the summary proceeding pending the plaintiff's appeal from the final order therein. If, however, the final order in the summary proceeding should be reversed or set aside and a new hearing should be ordered, the plaintiff, for the reasons already assigned, would then become entitled to a stay of further steps in the summary proceeding. The plaintiff was entitled

to the stay when he applied therefor, and, therefore, notwithstanding these proceedings in the interim which may seriously embarrass him, he is entitled to have the order reversed and to recover the costs and disbursements of the appeal and the costs of the motion for the injunction. But owing to the fact that the summary proceeding has been heard and decided, an injunction order will not be issued at the present time. The order is, therefore, reversed, with ten dollars costs and disbursements, and motion for an injunction granted, with ten dollars costs. Issuance of the injunction order, however, is suspended and will be issued only upon application of the plaintiff, which may be *ex parte*, on proof that the final order has been reversed or vacated, and upon plaintiff's filing a stipulation for a reference and immediate trial.

DOWLING, SMITH, MERRELL and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs; injunction to be issued only on application of plaintiff, which may be *ex parte*, on proof that final order has been reversed or vacated, and on plaintiff's filing stipulation for a reference and immediate trial. Settle order on notice.

MAX E. KLEIN, Trading under the Name of the ARROW SILK MILLS, Respondent, v. WILLIAM J. SMITH, Trading under the Name of WILLIAM J. SMITH SILK Co., Appellant.

First Department, April 1, 1921.

Sales — action to recover purchase price of goods sold — failure to prove amount of goods delivered — evidence — letter from buyer stating reason for rejecting goods admissible.

In an action to recover the purchase price of fifty-two pieces of cloth, a recovery cannot be had where the only proof by the plaintiff as to the amount of goods delivered was that each piece contained on an average about forty-five to sixty yards and that the agreed price was three dollars and thirty cents per yard, for there is no basis on which the jury can calculate the damage.

It was error for the court to charge that there was no dispute that the plaintiff sold and delivered to the defendant merchandise of the value alleged in the complaint, stating the value.

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First Department, April, 1921.

The defendant having interposed the defense that the goods were not as warranted and that he notified the plaintiff of his refusal to accept them, a letter written by the plaintiff to the defendant, in response to a statement by the defendant that he was holding the goods for return, in which the plaintiff said in effect that while the defendant did not state his reasons for wishing to return the goods the plaintiff presumed that it was due to dullness of business and the existence of a lower price on the goods, was admissible, and it was error to reject a registered letter written by the defendant to the plaintiff prior to either of the above letters, which the plaintiff refused to receive from the mail carrier, in which the defendant stated his reasons for rejecting the goods.

APPEAL by the defendant, William J. Smith, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of November, 1920, on the verdict of a jury for \$8,712.24, and also from an order entered in said clerk's office on the 24th day of November, 1920, denying defendant's motion to set aside the verdict and for a new trial made upon the minutes.

I. Maurice Wormser [*Samuel S. Kogan* with him on the brief; *Samuel S. Kogan*, attorney], for the appellant.

Isidor Enselman of counsel [*Jay A. Gilman*, attorney, with him on the brief], for the respondent.

PAGE, J.:

The action was for goods sold and delivered of the alleged value of \$8,317.24. The amended answer consists of a general denial and a special defense setting up that defendant agreed to buy from plaintiff fifty-two pieces of charmeuse which were warranted to be of a certain quality, in accordance with the sample submitted by the defendant; that plaintiff also warranted that the bulk of such merchandise consisted of perfect goods; and that after the delivery of the goods defendant, upon inspection, found that they were not perfect, and within a reasonable time after delivery notified the plaintiff that he refused to accept the goods and offered to return the same.

At the opening of the trial the attorneys stipulated that the plaintiff delivered to the defendant fifty-two pieces of merchandise. The attorney for the plaintiff then asked:

"Will you also concede that that is the merchandise that we claim was of the agreed price of \$8,317.24? That is our claim, you do not have to concede that it is worth that." To which defendant's attorney replied: "I do not concede that at all." The plaintiff proved that each piece of goods contained on an average about forty-five to sixty yards and that the agreed price was three dollars and thirty cents per yard, and rested. The defendant thereupon moved to dismiss the complaint on the ground that the plaintiff had failed to prove a cause of action. At the close of the entire case the plaintiff moved for a direction of the verdict. As the plaintiff failed to prove the number of yards that were delivered, there was no basis for the jury to calculate the damage. The court erroneously charged the jury: "There is no dispute that the plaintiff sold and delivered to the defendant merchandise of the value of \$8,317.24." The attorney for the defendant, however, took no exception to this portion of the charge, although he urges it upon his brief as reversible error.

The defendant testified that he went to the plaintiff's loft and was shown one piece of each color of the goods and about a yard or two from the end was exhibited to him, and that the plaintiff warranted that the bulk of the goods would correspond with the samples shown him, and further that the plaintiff warranted that the goods were perfect. The plaintiff, on cross-examination, stated that he sold that merchandise as absolutely perfect. It was proved that the goods were defective in many particulars. The plaintiff then put upon the stand the manufacturer of these goods, who testified that the defects in the goods were such as were common to goods of that grade. The court, by asking questions concerning certain marks that had been made upon the tickets attached to the goods, developed the fact that those marks had been placed there by the defendant and then charged the jury as follows: "If you determine that the defendant exercised dominion over the property, then the plaintiff is entitled to recover. By dominion we mean some act that would lead you to believe that the defendant when he took the property intended that it was his property and no longer that of the plaintiff. The fact that he marked each parcel with a number in his own

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business is a circumstance to be considered by you in determining whether or not there was such an exercise of dominion."

To this charge the defendant's counsel took exception. The defendant, on February tenth, after he had notified the plaintiff over the phone that he rejected the goods, sent a registered letter giving the reasons for the rejection. It was proved by the letter carrier that he presented this letter to the plaintiff and that the plaintiff refused to receive it. The letter with the envelope in which it was inclosed was offered in evidence. The court refused to receive the letter but allowed the envelope to be marked in evidence. On February eleventh the defendant wrote: "We are holding for return goods shipped us February 2, and would ask that you kindly send for same."

To this the plaintiff replied: "While you set forth no reason in your letter why you wish to return these goods, we presume that the fact that business is a little quiet and prices are a little lower, are your particular reasons and this compels us to take the above stand in this matter."

The reception of this letter in evidence was entirely proper, but the court's refusal to allow the defendant's notification giving reasons for the rejection to go in evidence was highly prejudicial.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, P. J., LAUGHLIN, DOWLING and SMITH, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

G. ROBISON & Co., INC., Respondent, v. HARRY KRAM,
Appellant. (Action No. 1.)

First Department, April 1, 1921.

Sales — action to recover purchase price of goods not delivered — complaint not stating cause of action — failure to allege facts showing passing of title — pleadings should follow statute.

Complaint in an action to recover purchase price of goods does not state a cause of action under subdivision 1 of section 144 of the Personal Property Law where it alleges an agreement for the sale of artificial silk by the pound at an agreed price; that pursuant to the agreement three cases, or 660

pounds, were delivered to and accepted and paid for by the defendant; that plaintiff duly offered to deliver the balance of 1,320 pounds but that the defendant wrongfully and in violation of the contract failed and refused to accept and pay therefor and still so refuses notwithstanding plaintiff's readiness, willingness and ability to deliver the goods and tender thereof and that plaintiff holds such balance of the goods for the account and subject to the order of the defendant.

The facts alleged in the complaint do not show such an identification and appropriation of the property to the contract as passed title thereto to the defendant.

Rule 1 of section 100 of the Personal Property Law, providing that where there is an unconditional contract to sell "specific goods in a deliverable state," title passes when the contract is made, cannot avail plaintiff, for it is not alleged that the sale was of specific goods in a deliverable state, but, on the contrary, it is alleged that the goods were to be imported, and that if they did not arrive, the plaintiff was to be under no obligation to deliver them to the buyer.

It is important that pleaders should be required to abandon the common-law form of pleading in such cases and follow the statute, and where recovery for the purchase price of undelivered goods is sought, the facts showing that, under the statute, title has passed to the buyer should be alleged.

APPEAL by the defendant, Harry Kram, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of October, 1920, overruling defendant's demurrer brought on and tried as a contested motion and granting judgment in favor of the plaintiff.

Lester B. Nelson of counsel [*Charles Ginsburg*, attorney], for the appellant.

Charles H. Tuttle of counsel [*Herman I. Lurie* and *Carl E. Peterson* with him on the brief; *Lurie & Feinberg*, attorneys], for the respondent.

LAUGHLIN, J.:

The complaint shows that the plaintiff, a domestic corporation, and the defendant, trading under the name of H. Kram & Co., made an agreement in writing on the 3d of September, 1919, whereby defendant agreed to purchase of the plaintiff fifteen cases of certain artificial silk at eight dollars and seventy cents per pound, to be delivered in September and October of that year, subject to the arrival of the goods from Europe;

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that a case of merchandise as contemplated in the contract consisted of 220 pounds and that the contract embraced 3,300 pounds; that 1,320 pounds were delivered to, accepted and paid for by the defendant and the agreement was then so modified that the remaining 1,980 pounds were to be artificial silk of a different grade for which the defendant was to pay seven dollars and fifty cents per pound; that pursuant to the modified agreement, 660 pounds were delivered to and accepted and paid for by the defendant; that plaintiff duly offered to deliver the balance of 1,320 pounds but that the defendant wrongfully and in violation of the contract failed and refused to accept or pay therefor and still so refuses notwithstanding plaintiff's readiness, willingness and ability to deliver the goods and tender thereof and that plaintiff holds such balance of the goods for the account and subject to the order of the defendant. Judgment is demanded for the *purchase price* of the balance of 1,320 pounds at seven dollars and fifty cents per pound aggregating nine thousand nine hundred dollars.

It thus appears that ~~the~~ the action is not to recover damages for the breach of the defendant's agreement to accept delivery and pay for the goods but to recover the purchase price of the undelivered goods. The complaint would have been good at common law; but in view of the changes in the common law made by article 5 of the Personal Property Law (as added by Laws of 1911, chap. 571), which is known as the Sales of Goods Act, and from which the quotations in this opinion are made, I think it is not good for the reason that the facts do not show such an identification and appropriation of the property to the contract as passed title thereto to the defendant. By virtue of the provisions of subdivision 1 of section 144 of the Personal Property Law, if title to the goods has passed to the buyer, the seller may maintain an action for the recovery of the purchase price. It is not alleged that the contract price was payable on a day certain irrespective of delivery or transfer of title and, therefore, the action is not authorized under subdivision 2 of section 144. Subdivision 3 of that section confers limited authority in cases where title has not passed to the buyer to bring an action for the purchase price as distinguished from one for damages; but such an action is only authorized thereby if the goods cannot be readily resold

for a reasonable price and if none of the provisions of section 145 are applicable and when, in such case, the buyer refuses to receive the goods on tender of delivery by the seller, and in those events the seller may notify the buyer that he holds the goods as his bailee and may then treat the goods as the property of the buyer and sue for the purchase price. Section 145 is not applicable. It relates only to the measure of damages in an action against a buyer for *damages* for wrongful neglect or refusal to accept and pay for goods. Two facts essential to authorize an action for the purchase price under said subdivision 3 of section 144 are not shown. They are that the goods cannot readily be resold for a reasonable price and that the seller has notified the buyer that he holds the goods as bailee for him. The sufficiency of the complaint, therefore, depends upon whether the facts stated show that the title to the goods has passed to the buyer so that the action may be maintained under subdivision 1 of section 144. Section 134 affords an unpaid seller certain other remedies, but it does not relate to an action for the purchase price. Section 98 provides that where the contract is for the sale of unascertained goods, no title passes until the goods are ascertained. Section 99 provides that where the contract is to sell specific or ascertained goods, title passes at such time as the parties intended and this is to be determined from the contract, the conduct of the parties thereunder, the usages of the trade and the circumstances of the case. Section 100 prescribes certain rules for ascertaining the intention of the parties with respect to the passing of title where the contract does not otherwise provide. Rule 1 of that section provides that where there is an unconditional contract to sell "specific goods, in a deliverable state," title passes when the contract is made. That rule is of no avail to the plaintiff for it is not alleged that the sale was of specific goods in a deliverable state. The goods were to be imported and if they did not arrive, the plaintiff was to be under no obligation to deliver them to the buyer. It is alleged in effect that they were to be in cases containing a specified number of pounds each; but no particular cases are in any manner identified. Subdivision 1 of rule 4 of section 100 provides, among other things, that where the contract is "to sell unascertained or future goods by description,

and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer," and that such assent may be expressed or implied and may be given before or after the goods are appropriated to the contract. There are other provisions in the rules under section 100 relating to cases where the goods are delivered to the buyer or to a carrier or other bailee *for transmission to or to hold for the buyer* and providing that in such a case the seller is presumed to have unconditionally appropriated the goods to the contract by so delivering them unless the seller reserves the right of possession or property when the goods are shipped or unless the seller is to deliver the goods *to the buyer or at a particular place or to pay transportation charges*, in which event title does not pass until the goods have reached the buyer or the place agreed upon or until the conditions specified in the reservation have been fulfilled. Manifestly, none of those provisions is in point for the essential facts to render them applicable are not alleged. It is equally plain, I think, that the facts do not show that goods in a deliverable state have been unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller within the purview of said subdivision 1 of rule 4 of section 100. The goods are in no manner identified by the facts alleged. If the buyer paid for them, he would neither obtain title to nor could he claim any particular goods. Counsel for the respondent argues that the goods were packed in cases identified by certain marks or numbers and that six specified marked cases containing the undelivered goods were tendered to the defendant and are held for his account; but it is not so alleged. Since the statute was intended to change the common law, I am of opinion that it is important that pleaders should be required to abandon the common-law form of pleading in such cases and follow the statute, and where, as here, recovery for the purchase price of undelivered goods is sought, the facts showing that under the statute title has passed to the buyer should be alleged. (See *American Aniline Products, Inc., v. Nagase & Co., Ltd.*, 187 App. Div. 555.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with ten dollars costs, with leave to plaintiff to amend on payment of the costs of the appeal and of the demurrer.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs, with leave to plaintiff to serve an amended complaint on payment of said costs.

G. ROBISON & Co., INC., Respondent, v. HARRY KRAM, Appellant. (Action No. 2.)

First Department, April 1, 1921.

Sales — action to recover purchase price of goods delivered and goods tendered and damages for breach of contract by refusal to accept goods — complaint stating cause of action.

The first count of the complaint in an action to recover the purchase price of goods delivered and for goods tendered but not accepted in which it is alleged that the plaintiff delivered a part of the goods which the defendant accepted but did not pay for, and that the plaintiff thereafter offered to deliver and tendered additional goods which the defendant refused to accept, is not subject to demurrer for insufficiency.

The second count of the complaint, which realleges the allegations of the first count and charges that the defendant subsequently repudiated the contract and refused to accept any further deliveries thereunder and that by reason of the premises the plaintiff was damaged in a specified amount, is not for the purchase price of the goods but for damages for the failure of the defendant to accept and pay for the goods, pursuant to the contract, and states a good cause of action within section 145 of the Personal Property Law; plaintiff was not required to allege the theory on which it estimates its damages.

APPEAL by the defendant, Harry Kram, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of October, 1920, overruling defendant's demurrer, brought on and tried as a contested motion, and granting judgment in favor of the plaintiff.

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First Department, April, 1921.

Lester B. Nelson of counsel [*Charles Ginsburg*, attorney], for the appellant.

Charles H. Tuttle of counsel [*Herman I. Lurie* and *Carl E. Peterson* with him on the brief; *Lurie & Feinberg*, attorneys], for the respondent.

LAUGHLIN, J.:

The complaint contains two counts, both based on a contract made November 6, 1919, for the sale of not less than forty nor more than fifty cases, at the option of the plaintiff, of artificial silk of two qualities described as third and fourth grade, each case to consist of 220 pounds, at seven dollars and ninety cents per pound for the third grade and seven dollars and fifty cents per pound for the fourth grade, to be delivered on the arrival of the goods from Holland between January 1 and September 1, 1920. The demurrer is to each count. In the first count it is alleged that on the 11th of March, 1920, plaintiff delivered one case of the goods to the defendant and that the goods were accepted and retained by him but not paid for; that the plaintiff thereafter duly offered to deliver and tendered five additional cases of the goods but the defendant wrongfully and in violation of the agreement failed and refused to accept the same and that the plaintiff at all times since has been and still is ready, willing and able to deliver the goods to the defendant and has ever since held and now holds them for the account and subject to the order of the defendant. Judgment is demanded for the contract purchase price of the goods delivered and of the goods the delivery of which was refused. The second count realleges, by reference, the facts alleged in the first count, and charges that the defendant subsequently repudiated the contract and refused to accept any further deliveries thereunder and that by reason of the premises the plaintiff has sustained damages in the sum of \$22,880, payment of which has been duly demanded but not made. Judgment is demanded for the amount specified in the second count. I am of opinion that neither count of the complaint was subject to demurrer for insufficiency. It may be that under our decision on the appeal by the defendant in action No. 1 between the same parties (195 App. Div. 873), which was argued and is to

be decided herewith, the plaintiff, if it goes to trial on the complaint in its present form, will not be entitled to recover the purchase price of the undelivered goods under the first count; but it is entitled to recover under that count for the goods delivered, accepted and not paid for. The second count is not for the purchase price but for damages for the failure of the defendant to accept and pay for the goods, the delivery of which was tendered, pursuant to the contract; and a right of action for damages on that theory is clearly given by section 145 of the Personal Property Law (as added by Laws of 1911, chap. 571). Counsel for the appellant argues that the second count is insufficient in that it fails to state the theory on which the plaintiff claims to be entitled to recover the amount of damages specified. The count charges a breach of the contract and that the plaintiff has thereby sustained damages in a specified amount. Under those allegations, it will be entitled to recover such damages as it may be able to show under the rules of damages prescribed in section 145 applicable to the facts. It is not an essential to the sufficiency of the complaint that the plaintiff should allege the theory on which it estimates its damages in such a case. If it should become necessary for the defendant, in order properly to plead or to defend the action, to know on what theory or under which subdivision of section 145 the plaintiff claims damages, his remedy is an application, on showing such necessity, to have the complaint made more definite and certain or for a bill of particulars. (See Code Civ. Proc. §§ 531, 546.)

It follows that the order should be affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term.

CLARKE, P. J., DOWLING, SMITH and GREENBAUM, JJ.,
concur.

Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term.

CASES REPORTED WITH BRIEF SYLLABI

AND

DECISIONS HANDED DOWN WITHOUT OPINION.

FIRST DEPARTMENT, JANUARY, 1921.

CHARLES A. ROGERS, Respondent, *v.* ROBERT T. RASMUSSEN and Others,
as Administrators, etc., of DENNIS J. DONOVAN, Deceased, and BAY
RIDGE THEATRE CORPORATION, Appellants.

Injunction — modification.

Appeal from order of the Supreme Court, entered in the New York county clerk's office September 28, 1920, granting an injunction *pendente lite*.

PER CURIAM: The injunction order should be modified by limiting the amount of the stock required to be held by each of the defendants to \$18,000 par value, and by further providing that the defendants shall be entitled to have the order vacated on proof that they have deposited with the clerk of the court, or otherwise, as they and the plaintiff may agree, stock of the par value of \$18,000, subject to the final order of the court on the trial of the issues, and as so modified affirmed, with ten dollars costs and disbursements to the appellants. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ. Order modified as stated in opinion and as so modified affirmed, with ten dollars costs and disbursements to the appellants. Settle order on notice.

JOHN H. CANHAM, Suing, etc., Plaintiff, *v.* COMMONWEALTH FINANCE CORPORATION and Others, Defendants.

Appeal — appeal cannot be taken till order entered — stay of proceedings denied when order not entered.

Motion by defendants for a stay of proceedings pending an appeal from an order of the Supreme Court appointing temporary receivers.

PER CURIAM: The Special Term not having entered the order which it announced it intended to make, no appeal therefrom could be taken. Hence, no appeal is pending in this court. The motion for a stay is, therefore, premature, and for that reason must be denied and the stay contained in the order to show cause vacated. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Motion denied with ten dollars costs and stay vacated.

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JAMES HOWDEN & COMPANY OF AMERICA, INC., Respondent, v. AMERICAN CONDENSER AND ENGINEERING CORPORATION, Appellant.

Appeal — leave granted to appeal to Court of Appeals — foreign corporations — right to counterclaim where license fee not paid.

Motion by the plaintiff for leave to appeal to the Court of Appeals from an order of this court reversing an order of the Special Term of the Supreme Court, New York county, and sustaining defendant's demurrer to affirmative defenses in plaintiff's reply to defendant's counterclaims.

PER CURIAM: The motion for leave to go to the Court of Appeals should be granted. The question involved is one of statutory construction and one of considerable importance, as bearing upon the right of a foreign corporation sued in this State to assert a counterclaim without having paid the license fee as prescribed in section 181 of the Tax Law.* In the opinion rendered upon the reversal of the order [194 App. Div. 164], reference was made to the case of *Alsing Co. v. New England Quartz Co.* (66 App. Div. 473) and it was stated that what was said in the opinion in that case as to the interpretation of this provision cannot be deemed to be controlling because in that case the remarks were purely obiter, inasmuch as the action there brought was brought before the passage of the act of 1895.† This statement was inadvertently made. That part of the opinion in the *Alsing* case referred to was obiter, not because the action there brought was brought before the passage of the act of 1895, but because the right to interpose a counterclaim in that action was challenged only under the act of 1892‡ for failure to file a certificate from the Secretary of State authorizing the corporation to do business within the State. Motion granted and questions certified. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Motion so far as to grant leave to appeal to Court of Appeals granted; questions certified.

In the Matter of Proving the Last Will and Testament of SAMUEL TREMPER LONGMAN, Deceased, as a Will of Real and Personal Property.

Appeal — motion to dismiss on ground that appeal not taken in time denied when copy of decree and notice of entry not served by moving party.

Motion by Dorothy B. Longman, a legatee, and by the proponent, to dismiss the appeal of Rose H. Longman, contestant, from a decree of the surrogate, New York county, admitting a will to probate.

PER CURIAM: Dorothy B. Longman, who moves to dismiss the appeal, not having served a copy of the decree with notice of entry upon the appellant, has not set appellant's time running as to her. Appellant may, there-

* Amd. by Laws of 1917, chap. 490.— [REP.]

† Laws of 1895, chap. 240.— [REP.]

‡ Gen. Corp. Law (Gen. Laws, chap. 35; Laws of 1892, chap. 687), § 15.— [REP.]

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fore, still serve a notice of appeal as against the moving party, and this motion to dismiss is, therefore, denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ. Motion to dismiss appeal denied, with ten dollars costs.

KURT HEYMAN v. HAGOP KEVORKIAN and Others.— Motion denied, without costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

KEVORKIAN, INC., v. KURT HEYMAN.— Motion denied, without costs, and order of November 12, 1920, resettled. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

FAULTLESS FUR MANUFACTURING COMPANY, INC., Appellant, v. 159 WEST 25TH STREET COMPANY, INC., Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

BYRDIE STONE, Respondent, v. HUBERT W. KLEIN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

RICHARD MARTIN, Respondent, v. CLAFINS, INCORPORATED, Appellant.— Orders affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

PHILIP LIPPS and Others, Appellants, v. ABRAHAM TANENHAUS and Another, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

UNIVERSAL STEEL EXPORT COMPANY, INC., Respondent, v. N. & G. TAYLOR COMPANY, INC., Appellant.— Order modified as directed in order and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

MARY E. T. DUNN, Appellant, v. ANNA R. MOORE and Others, Appellants, Impleaded with JOHN J. BRADY, JR., and Others, Respondents, and Others, Defendants.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

EDWARD L. CORLIES, Appellant, v. ATLANTIC COAST LINE RAILROAD COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

JAMES J. E. BURKE, Appellant, v. ATLANTIC COAST LINE RAILROAD COMPANY, Respondent. (Action No. 1.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

JAMES J. E. BURKE, Appellant, v. ATLANTIC COAST LINE RAILROAD COMPANY, Respondent. (Action No. 2.) — Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CLARA ELIZABETH MAE MALONE HEINEMAN, as Executrix, etc., of LOUIS

HEINEMAN, Deceased, Respondent, v. LICHTENSTEIN BROS., INC., Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

SAMUEL BAYER and Others, Appellants, v. JAMES A. RILEY and Another, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ACME WOOD CARPET FLOORING COMPANY, Respondent, v. WALKER D. HINES, as Director General of Railroads, Operating the CENTRAL RAILROAD OF NEW JERSEY, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CHESTER A. BRAMAN and Others, Copartners, etc., Appellants, v. JOSEPH KREINIK, Respondent.— Order modified by providing that the order for examination be further limited by striking out the provisions under subdivisions 1, 2, 6, 7, 8 and 9 thereof, and as so modified affirmed, without costs. The date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

EDWARD BRENNAN, an Infant, by JAMES BRENNAN, His Guardian ad Litem, Respondent, Appellant, v. JOHN VAN PRAAG, Defendant.— Order reversed and motion granted, without costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

BURGHARD STEINER, as Surviving Partner, etc., Respondent, v. MAX RADT, Appellant, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

HARRY SAMWICK, Respondent, v. BLINDERMAN & COHEN AMUSEMENT COMPANY, INC., and Another, Impleaded with ELIAS MAYER and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

In the Matter of JENNIE L. BROBST, Deceased.— Motion to dismiss appeal denied, with leave to renew as stated in order. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CARL F. GUGGENBUHLER v. CAST-A-LINER COMPANY and Others.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant complies with terms stated in order. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ROBERT J. MACHER v. ANNIE GRUBER.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

JACOB GRIFFEL and Others v. COLUMBIA KID LEATHER MANUFACTURING COMPANY, INC.— Motion to dismiss appeal denied, without costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

DAVID C. LINK v. JOSEPH J. THOMSTORFF.— Motion to dismiss appeal

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granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. THOMAS WESTON, Indicted as GEORGE HATTON.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. GEORGE W. STIVERS.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. JOHN RIZZO.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. WILLIAM RILEY.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. HELEN PERRY.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. WILLIAM BRENNAN.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. NICHOLAS DARANO.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. LOUIS GUMA.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. FLORENCE WRIGHT.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. FRANK IRVING.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. EDWARD A. HUTCHINGS.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

In the Matter of FREDERICK GERHARD, Deceased.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ISABELLA BERTHEL v. SAMUEL AUSPITZ.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

FEDERAL ESTATES CORPORATION v. LUCCA RESTAURANT COMPANY, INC.— Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

FANNIE LEVY v. IMPERIAL MANUFACTURING AND TRADING COMPANY, INC.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CUTLER REALTY COMPANY v. THE TENEO COMPANY, INC.—Application granted. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PENNSYLVANIA AND DELAWARE OIL COMPANY v. A. KLIPSTEIN & COMPANY.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ABRAHAM FLEISCHMAN and Others v. FRANCIS E. JOHNSON and Others, Individually and as Surviving Executors, etc.—Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

PATRICK A. GAYNOR v. TAYLOR MORE.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ORVILLE REALTY COMPANY, INC., v. HARRY T. WARNICK.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

GENUINE PANAMA HAT WORKS, INC., v. ALBERT MOSES and Others.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

LOUIS A. SLATTERY v. SAMUEL S. JONES.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

MARYLAND CASUALTY COMPANY v. JAMES AUDITORE & COMPANY, INC.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

A. STERN & COMPANY v. AVEDON & COMPANY, INC.—Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

RAYMOND C. PARKER v. PAUL C. SIMON.—Motion granted; question certified. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ADOLPH BULOVA v. S. S. CORPORATION, Impleaded, etc.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CHARLES P. DORFF v. ANTONIO TAYA and Others.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

NICHOLAS A. GALANOS v. THE NEW YORK CENTRAL RAILROAD COMPANY.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

JACOB L. ANDRON v. HARRIS FUNK, Impleaded, etc.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

SAMUEL LASHER v. METROPOLITAN SAVINGS BANK.—Motion granted, provided motion for leave to appeal, etc., be made returnable on January 21, 1921. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE BROOKLYN CITY RAILROAD COMPANY v. LEWIS NIXON, etc., and Others.—Motion denied, with ten dollars costs, and stay vacated. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ANNA DOMB v. LOUIS DOMB.—Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ROBERT M. SILVERMAN v. J. HERBERT WARE and Others.—Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

WILLIAM OLECK v. ALEXANDER H. DEBSKI.—Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

O. FRIEDLANDER CHEMICAL COMPANY, INC., v. WILLIAM H. KNOX & COMPANY, INC.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ALICE T. MULCAHY v. JOSEPHINE K. McMARTIN.—Application granted. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

LEONORE HARRIS, Respondent, v. THE VOGUE COMPANY and Another, Appellants.—Order reversed, with costs, and verdict reinstated on the authority of *Harris v. Gossard Co., Inc.* (194 App. Div. 688), handed down herewith. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

LOUIS SCHWARTZ and Another, Respondents, v. PAUL GERLI & COMPANY, INC., Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MORTIMER B. FOSTER, Respondent, v. N. W. HALSEY & COMPANY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HELVETIA REALTY COMPANY and Another, Appellants, v. JOHN P. LEO and Others, Constituting the Board of Appeals of the City of New York, Respondents. NEW PINE STREET REAL ESTATE CORPORATION, Intervenor, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.; Merrell, J., dissenting.

JAMES DI ANGELO, an Infant, by His Guardian ad Litem, JOSEPH DI ANGELO, Respondent, v. WILLIAM F. WILKE, Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LEON LIEBERMAN, Appellant.—Judgment reversed and new trial ordered on the authority of *People v. Luft* (192 App. Div. 713) and *People v. Lilymeld* (Id. 719). Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

WILLIAM M. AUSTIN and Another, Copartners, etc., Respondents, v.

CHARLES KLEIN and Another, Copartners, etc., Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MAX WINSLOW, Appellant, v. HENRY WATKINSON, Respondent.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

WILLIAM BARNETT, Appellant, v. MARY BARNETT, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MAX WEINBERGER, as Administrator, etc., of SADIE WEINBERGER, Deceased, Respondent, v. AMERICAN RAILWAY EXPRESS COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ABRAHAM I. WEISSMAN, Respondent, v. BARNET DAVIS and Another, Copartners, etc., Respondents.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.; Clarke, P. J., dissenting.

In the Matter of Proving the Last Will and Testament of THEODORE ANGELO, Deceased. JOHN M. TOBIN, Appellant; LIZZIE B. TALBOT and Another, as Executors, etc., and Others, Respondents.— Decree affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ANTHONY BORRELLI, an Infant, by NUNZIO BORRELLI, His Guardian ad Litem, Respondent, v. BERNARD GARLAND, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

NUNZIO BORRELLI, Respondent, v. BERNARD GARLAND, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

HYMAN KORENMAN, Respondent, v. MAX GOLDSTEIN, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

RICHARD EDWARD BEACH, Respondent, v. MARY EDNA BEACH, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THOMAS O'SULLIVAN, Respondent, v. THOMAS F. FARRELL, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

RICHARD A. CHARTRAND, an Infant, by RICHARD CHARTRAND, His Guardian ad Litem, Respondent, v. W. ROSS PROCTOR, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

RICHARD CHARTRAND, Respondent, v. W. ROSS PROCTOR, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

ALEXANDER PFEIFFER, Respondent, v. MAURICE M. STERNBERGER and Another, Appellants, Impleaded with Others.— Order affirmed, with ten

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dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

HESTER MOTORS, INC., Respondent, v. JOSEPH HUBER, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CHARLES A. ROGERS, Respondent, v. GEORGE RASMUSSEN, Appellant, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CHARLES A. ROGERS, Respondent, v. ROBERT J. KEELER, as Administrator, etc., of DENNIS J. DOWAN, Deceased, Appellant, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CHARLES A. ROGERS, Respondent, v. BAY RIDGE THEATRE CORPORATION, Appellant, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

CHARLES A. ROGERS, Respondent, v. ROBERT T. RASMUSSEN, Appellant, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

JOSEPH KOMOSTOFF and Others, Appellants, v. MAX DORF, Respondent.— Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

FRANK WISE, Appellant, v. DIRECTOR-GENERAL OF RAILROADS (THE NEW YORK CENTRAL RAILROAD COMPANY), Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

NATIONAL IMPORTING AND TRADING COMPANY, Respondent, v. DAVID C. LINK and Others, Copartners, etc., Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM MARTINI, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

In the Matter of the Appraisal under the Transfer Tax Laws of the Estate of MARY A. EARLY, Deceased. **CHARLES M. EARLY, Individually and as Administrator, etc., and Another, Appellants; COMPTROLLER OF THE STATE OF NEW YORK, Respondent.**— Order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

In the Matter of the Transfer Tax upon the Estate of EUGENE WILSON CALDWELL, Deceased. COMPTROLLER OF THE STATE OF NEW YORK, Appellant; ELIZABETH PERKINS CALDWELL and Another, as Executors, etc., Respondents.—Order affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

O. FRIEDLANDER CHEMICAL COMPANY, INC., Respondent, v. WILLIAM H. KNOX & COMPANY, INC., Appellant.—Judgment and order affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NATIONAL PARK BANK OF NEW YORK, Respondent, v. JACOB A. CANTOR, President, and Others, as Commissioners of Taxes and Assessments of the City of New York, Appellants. (Taxes of 1919.)—Order affirmed, with \$10 costs and disbursements. No opinion. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.; Smith, J., dissenting and voting to reduce the aggregate assessment by \$877,810.01, representing interest earned but not collected.

BENJAMIN SELTZER, Respondent, v. PIETRO INDELLI, Appellant, Impleaded with Another.—Judgment and order reversed and a new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce the judgment as entered to the sum of \$3,632.10, including costs; in which event the judgment as so modified and the order appealed from are affirmed, without costs. No opinion. Settle order on notice. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

LIANA R. O'NEIL, Respondent, v. MCKINLEY MUSIC COMPANY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

UNITED STATES MORTGAGE AND TRUST COMPANY, Respondent, v. LIBERTY NATIONAL BANK, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HARRY DE VEAUX, Respondent, v. BILLBOARD PUBLISHING COMPANY and Others, Appellants, Impleaded with Another.—Order affirmed, with ten dollars costs and disbursements, with leave to defendants to withdraw demurrers and to answer on payment of said costs and ten dollars costs in each case as provided in the order appealed from. No opinion. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HOOVER ELECTROCHEMICAL COMPANY, Respondent, v. CHIPMAN CHEMICAL AND ENGINEERING COMPANY, INC., Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ANNA BRESLIN O'NEIL, Respondent, v. ROMAN BATHS COMPANY, INC., Appellant.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce the judgment as entered to \$7,659.25, including interest and costs, in which event the judgment as so modified and the order appealed from are affirmed, without costs. No opinion. Settle order on notice. Present—Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

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FREDERICK A. O'NEIL, Respondent, v. ROMAN BATHS COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GEORGE H. PERRY, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.; Clarke, P. J., and Page, J., dissenting.

ROBERT T. SHELDON and Others, as Committee of Bondholders of ST. GEORGE'S LUMBER COMPANY, LIMITED, etc., Respondents, v. ALMIRA S. KNOFF, as Executrix, etc., of AUGUST E. KNOFF, Deceased, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

WILLIAM H. DALY, Appellant, v. GEORGE W. WEBB, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

JOHN M. RIEHLE & Co., INC., Appellant, v. LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA, Respondent.— Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

WILLIAM FELSINGER and Others, as Executors, etc., of JAMES L. WANDLING, Deceased, Respondents, v. JAMES CLYDE WANDLING, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

FRANK M. BENNET and Others, Committee in Charge of the Business of LOUIS H. FOSTER, Respondents, v. HERX & EDDY, INC., Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

FRANCESCO GUZZI, Respondent, v. THE CITY OF NEW YORK, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

FORBES J. HOLLAND, Respondent, v. SINGER SEWING MACHINE COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

JOSEPH A. ARCHER, Appellant, v. THE NEW YORK TRANSFER COMPANY, Defendant, Impleaded with THE WESTCOTT EXPRESS COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.; Laughlin, J., dissenting.

ARTHUR S. BARNES, Respondent, v. J. ARTHUR HILTON, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ISADOR WEINBERG, Doing Business under the Firm Name and Style of A. WEINBERG, Respondent, v. MORRIS LOWENSTEIN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

STUART ROBSON, Appellant, v. WINCHELL SMITH and Another, Respondents, Impleaded with Others.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ERNEST H. GRUENING, Appellant, v. THE TRIBUNE ASSOCIATION (Corporate Name Changed, etc.), Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

DAVID ROBERTSON, Respondent, v. THE FEDERAL X-RAY CO., INC., Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

EVA K. CONLON, Appellant, v. MARY ANN KELLY and Others, Impleaded with EDWARD B. HOSIER, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SAM AGROW, Respondent, v. HAROLD EDDY JOHNSTON, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MARIE KRUTIAKOFF, Respondent, v. BORIS M. KRUTIAKOFF, Appellant.—Order modified by striking out provision for alimony, and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HENRY T. SHELDON, Respondent, v. JAMES H. REID and Another, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

DAVID MACKENZIE, Respondent, v. GABRIEL A. BORRICK, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM OLECK, Respondent, v. ALEXANDER H. DEBSKI, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SANGER & JORDAN, Respondent, v. BOBBS-MERRILL COMPANY, Appellant.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

FLORENA RICCARDI, as Administratrix, etc., of FRANCISCO RICCARDI, Deceased, Respondent, v. HERMAN STUCKE, Appellant, Impleaded with Others.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

JOSEPH KANNER, an Infant, by ISAAC KANNER, His Guardian ad Litem, Respondent, v. THE F. & M. SCHAEFER BREWING COMPANY, Appellant, Impleaded with Another.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ISAAC KANNER, Respondent, v. THE F. & M. SCHAEFER BREWING COMPANY, Appellant, Impleaded with Another.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulate to reduce judgment as entered to the sum of \$575.72,

in which event the judgment as so modified and the order appealed from are affirmed, without costs. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

JACOB WAXMAN, Respondent, v. ISIDOR LANDAU, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM SHERRILL, Appellant. Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

MORRIS STEINHARDTER and Another, Appellants, v. A. LEOPOLD AUERBACH and Another, Copartners, etc., Respondents.— Order modified by allowing service of "amended" answer instead of "supplemental" answer, and as so modified affirmed, with ten dollars costs and disbursements to respondents. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of the Application of HUGH P. OROCKE and Others, Appellants, for a Determination, etc., "Old Kingsbridge Road, etc.," Borough of the Bronx, City of New York. MARGARET M. GLEASON, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

J. BRADFORD ERB and Others, Appellants, v. PETROLEUM CORPORATION OF AMERICA and Another, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LILLIE ARESONI, Respondent, v. JESSIE ULLREY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JENNIE B. HANSEN, Respondent, v. HAROLD C. HANSEN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SOLOMON GOLUB, Respondent, v. ALBERT B. HISE, Appellant. (2 cases.)— Orders reversed, with ten dollars costs and disbursements, and motions granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

UNION SMOKED FISH COMPANY, INC., Respondent, v. TILLAMOOK BAY FISH COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HENA S. KASTENBAUM, Respondent, v. SAMUEL KASTENBAUM, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HOISTING MACHINERY COMPANY, Appellant, v. ELDERFIELDS RESERVATION, INC., Respondent.— Order modified by striking out the provision allowing defendant to file an amended answer, and as so modified affirmed without costs, on the ground that the notice of motion contained no request for such relief, and no proposed amended answer was attached to the motion papers. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ABRAHAM L. BUSCHMAN, Appellant, v. NATHAN H. BUSCHMAN and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.; Smith, J., dissenting.

SOLOMON GREENBAUM and Another, Copartners, etc., Respondents, v. JACOB KEMPF, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.; Clarke, P. J., and Page, J., dissenting.

HOWARD MAJOR, Appellant, v. FRANK FRANKEL, Respondent.— Order affirmed, with ten dollars costs and disbursements, the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY SAMWICK, Respondent, v. BLINDERMAN & COHEN AMUSEMENT COMPANY, INC., and Another, Impleaded with ELIAS MAYER and Others, Appellants, Impleaded with Others.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SOLOMON GOLUB v. ALBERT B. HISE.— Motions to dismiss appeals denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

EMPIRE DEVELOPMENT COMPANY and Others v. TITLE GUARANTEE AND TRUST COMPANY.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JOEL MARKS v. JACOB MAYERS.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JOSEPH GREENBERG v. RICHARD GODFREY.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant complies with terms stated in order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JOHN MULDOON v. DOCK CONTRACTOR COMPANY and Others.— Motion to dismiss appeal granted, with ten dollars costs, unless appellants comply with terms stated in order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of JENNIE L. BROBST, Deceased.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of JOHN T. PRYER, Deceased.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

434 BROADWAY REALTY CORPORATION v. STONE & SCHLEIMER, Impleaded, etc.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY GORDON v. ASTORIA COGNAC AND LIQUOR RECTIFYING COMPANY, INC., and Others.— Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

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BERNARD PHILLIPS & COMPANY, INC., v. MAYER SHIRT COMPANY.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

YORKVILLE MOTOR COMPANY, INC., v. SAMUEL P. CRONER.—Application granted. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MAX MELNICK v. BORE BORDEN.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

AMERICAN NATIONAL BANK OF WAUSAU, WIS., v. HARRY J. BUTLER and Others.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY M. JAMES v. EIGHTH AVENUE RAILROAD COMPANY.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JUAN ALONZO v. ELBERT & COMPANY, INC.—Application denied, with ten dollars costs, and stay vacated. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM LENNOX and Others v. ANTON F. SCIBILIA and Others.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SAMUEL J. GOLDSMITH and Others, Trustees, etc., v. ARTHUR J. BALDWIN and Others, as Surviving Trustees, etc.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

FIRST NATIONAL BANK OF MISSION v. ROBERT T. COCHRAN and Others.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

BARBARA SCHNATZ v. GEORGE J. SCHNATZ and Others.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY B. JAMES and Others v. GORDON MILLER.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. POST & McCORD, INC., v. JACOB A. CANTOR and Others, etc.—Motion granted. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SAMUEL LASHER v. METROPOLITAN SAVINGS BANK.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

UNION EXCHANGE NATIONAL BANK OF NEW YORK v. SAMUEL L. JOSEPH.—Motion granted; question certified. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of JAMES BUCHANAN BRADY, Deceased.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of NEWTOWN GAS COMPANY v. PUBLIC SERVICE COM-

MISSION.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY SAMWICK V. BLINDERMAN & COHEN AMUSEMENT COMPANY, INC., and Another, Impleaded with ELIAS MAYER and Others.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES J. SILVER V. AKRON TIRE COMPANY OF DELAWARE and Others.—Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LITTLEFIELD-SHEPHERD COMPANY, INC., v. JOHN C. DUNN.—Motion denied, with ten dollars costs, and stay vacated. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of JENNIE L. BROST, Deceased.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MABEL A. LUDLAM V. HENRY LUDLAM and Others.—Motion for allowance denied, except as allowed by the order of reversal entered herewith. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

MABEL A. LUDLAM V. HENRY LUDLAM and Others.—Motion for restitution denied, except as allowed by the order of reversal entered herewith. Present — Clarke, P. J., Laughlin, Dowling, Page and Greenbaum, JJ.

SECOND DEPARTMENT, JANUARY, 1921.

DONALD MCKELLAR, Respondent, v. AMERICAN SYNTHETIC DYES, INC.
Appellant.

Appeal — amendment of order and judgment of Appellate Division to specify particular question of fact on which reversal based.

Motion to amend the order and judgment of the Appellate Division, Second Department, entered upon its decision (181 App. Div. 371), so as to specify the particular question of fact upon which the reversal is based.

JENKS, P. J.: The order entered upon our decision herein (181 App. Div. 371) simply reversed the judgment and order appealed from and granted a new trial. After motion made in the Court of Appeals, and by permission of that court (229 N. Y. 603), the defendant moves that we amend the order and judgment to specify the particular question of fact upon which our reversal is based. Our opinion states that we found error in the charge to the jury. Inasmuch as the "error" was not the subject of objection, exception or request, the Court of Appeals decided that the erroneous ruling constituted a "question of fact," in that the question presented is whether the party has had a fair trial. (*McKellar v. American Synthetic Dyes, Inc.*, 229 N. Y. 106.) We amend our judgment and order so that said judgment and order state that this court in the exercise of its

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discretion determines and adjudges that the defendant did not have a fair trial, and, therefore, the judgment and order should be reversed and a new trial should be granted, with costs to abide the event, and that such reversal is based upon the question of fact that the court erred in charge and instruction to the jury as to the meaning of the contract of employment and as to what was to be found by the jury in order to entitle the plaintiff to a verdict upon said contract. Mills, Rich, Putnam and Blackmar, JJ., concur. Motion to resettle order granted *nunc pro tunc* as of November 5, 1920.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THE LONG ISLAND RAILROAD COMPANY and THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Appellants.

Appeal by the defendants from an order of the Supreme Court, made at the Kings County Special Term, and entered in the office of the clerk of the county of Kings on the 31st day of December, 1920, enjoining them, *pendente lite*, from increasing certain rates.

JENKS, P. J. (orally): I am ready to announce the decision. Without passing upon the merits of any question presented, we are of opinion that the jurisdiction was exclusively that of the Federal courts. Disposing of this appeal upon that point only, we reverse the order which granted the injunction, without costs, and deny the injunction, without costs. If the case is relieved of injunction, we grant the application for appeal. You may submit an order with the proposed question. If the Attorney-General will serve upon Mr. Keany a copy of the proposed order, Mr. Keany may present his proposed order to me. The motion for a stay will be denied. Rich, Putnam, Blackmar and Jaycox, JJ., concur. Order reversed, without costs, and motion denied, without costs. Motion for leave to appeal to the Court of Appeals granted. Settle order granting leave to appeal before the Presiding Justice.

PATRICK J. DRISCOLL, Respondent, *v.* MARY A. DRISCOLL, as Administratrix, etc., of JOHN J. DRISCOLL, Deceased, Appellant.— Motion denied, without costs. Present — Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ.

ARTHUR M. FLADE, Respondent, *v.* MATHILDA M. GERHOLD and Others, Appellants.— Motion denied on condition that appellants perfect the appeal, place the case on the calendar for the February term and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ.

In the Matter of an Application for Leave to Enter into Possession and to Manage and Control and Receive the Rents of Real Property Left by CHARITY C. MOULD, Deceased.— Motion denied, without costs. Present — Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ.

In the Matter of the Application of the TRANSIT CONSTRUCTION COMMISSIONER for the Appointment of Three Commissioners, etc. Modification

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of Fourteenth Street — Eastern Line. Route No. 68.— Motion denied, without costs. Present — Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ.

In the Matter of the Estate of JERONEMUS S. UNDERHILL, Deceased.— Motion denied, without costs. Present — Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ.

VIRA CORNELL KINEON, Respondent, v. OSCAR N. HOFFMAN and HELEN GREIFF, Appellants, Impleaded with Others.— Motion for reargument denied. Motion for leave to appeal to the Court of Appeals denied, without costs. But the appellants are granted a stay of thirty days of sale of the stock by the receiver to afford opportunity to apply to the Court of Appeals for leave to appeal to that court. Present — Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ.

ANNA LEVINE, Respondent, v. HENRY GORDON, as Executor, etc., Appellant.— Motion denied on condition that appellant perfect the appeal, place the case on the calendar for the February term and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ.

ANTONIO MAROTTA, Respondent, v. LINDLEY M. GARRISON, as Receiver of the CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Appellant.— Motion denied, without costs. Present — Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ.

CITY OF NEW YORK, Respondent, v. CHARLES STEEN, INC., Appellant. (Appeal No. 1.) — Order of the Appellate Term affirmed, with costs. No opinion. Mills, Rich, Blackmar and Jaycox, JJ., concur; Jenks, P. J., dissents.

CITY OF NEW YORK, Respondent, v. CHARLES STEEN, INC., Appellant. (Appeal No. 2.) — Order of the Appellate Term affirmed, with costs. No opinion. Mills, Rich, Blackmar and Jaycox, JJ., concur; Jenks, P. J., dissents.

THE COMMISSIONER OF PUBLIC CHARITIES OF THE CITY OF NEW YORK, on Complaint of MAUD CORDES, Respondent, v. SIGMUND MILAU, Appellant.— Order of filiation of the Court of Special Sessions affirmed, with costs. No opinion. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

JULIA DEITEL, as Administratrix, etc., of LOUIS DEITEL, Deceased, Respondent, v. JACOB GROSSMAN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ., concur.

JOSEPH DOWLING, Appellant, v. AMERICAN ELEVATOR COMPANY and Another, Respondents.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

LYMAN B. JORDAN, Appellant, v. THE VILLAGE OF PORT CHESTER, Respondent.— Judgment reversed and new trial granted, with costs to abide the event, upon the ground that the preliminary notice was sufficient under the authority of *Sheehy v. City of New York* (160 N. Y. 139) and

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Sweeney v. City of New York (225 id. 271). Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

THOMAS KENNEDY, Respondent, v. THOMAS F. GILLEN COMPANY, INC., Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

SAMUEL KORNBLUM, Respondent, v. HARRY ALPERN and JOSEPH ALPERN, Appellants.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

LOUIS SHERRY, INC., Appellant, v. FREDERICK LINDE RYON, Respondent.— Order affirmed, without costs. No opinion. Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ., concur.

HENRY LUNDBERG, Respondent, v. MILDRED LUNDBERG, Appellant, and Another, Defendant.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

STEPHEN A. MACHCINSKI, Respondent, v. LEHIGH VALLEY RAILROAD COMPANY, Appellant, Impleaded with JOHN KOZANOWICZ, Defendant.— Judgment affirmed, with costs. No opinion. Mills, Putnam and Kelly, JJ., concur; Jenks, P. J., and Jaycox, J., dissent.

HARRY MEYERSON, Respondent, v. CARAVEL COMPANY, INC., Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ., concur.

ROSARIO MIRABILIO and Another, as Administrators, etc., of RAFFELLO DI FELIPPO, Deceased, Respondents, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

GERALD MORRELL, Respondent, v. BROOKLYN BOROUGH GAS COMPANY, Appellant. (Appeal No. 2.) — Order granting application of the city of New York to intervene affirmed, with ten dollars costs and disbursements. (See *New York & Richmond Gas Co. v. Nixson*, 192 App. Div. 923.) Jenks, P. J., Mills, Putnam and Kelly, JJ., concur; Blackmar, J., dissents on the ground that the city of New York has no interest in this controversy for the reasons stated in his dissenting opinion in *Morrell v. Brooklyn Borough Gas Co.*, No. 1 (*ante*, p. 7), decided herewith.

GERALD MORRELL, Respondent, v. BROOKLYN BOROUGH GAS COMPANY, Appellant. (Appeal No. 3.) — Order overruling defendant's demurrer to the complaint affirmed, with ten dollars costs and disbursements. (See opinions in *Morrell v. Brooklyn Borough Gas Co.*, No. 1 [*ante*, pp. 1, 6, 7], decided herewith.) Mills, Putnam and Kelly, JJ., concur; Blackmar, J., dissents for the reasons expressed in his dissenting opinion in *Morrell v. Brooklyn Borough Gas Co.*, No. 1 (*ante*, p. 7), and thinks that the order overruling demurrer should be reversed and the demurrer sustained, with whom Jenks, P. J., concurs.

POLIN NARBIN, as Administratrix, etc., of MAGDALENE UKELIS, Deceased, Respondent, v. DORA NONAS, Appellant.— Order in so far as appealed from affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ., concur.

NELSON C. OSBORNE, Respondent, v. NATHAN H. HAND and Others, Defendants, Impleaded with FRANK B. WIBORG, Appellant.— Order of the County Court of Suffolk county affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HANNAH LEVINE (Correct Name FANNIE KAUFMAN), Appellant.— Judgment of conviction of the Court of Special Sessions reversed, and new trial ordered, on the ground that the guilt of the defendant was not shown beyond a reasonable doubt. Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM RHODES, JR., Appellant, v. KATHERINE ELAINE RHODES, Respondent.— Final order affirmed, without costs, and without prejudice to a further application at the expiry of six months. No opinion. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ARTHUR SEEBLIP, Respondent, v. RICHARD E. ENRIGHT, as Police Commissioner of the City of New York, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ., concur.

ERNEST J. ROGERS, Appellant, v. THE VILLAGE OF PORT CHESTER, Respondent.— Judgment reversed and new trial granted, with costs to abide the event, upon the ground that the preliminary notice was sufficient under the authority of *Sheehy v. City of New York* (160 N. Y. 139) and *Sweeney v. City of New York* (225 id. 271). Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

EVELYN G. ROGERS, Appellant, v. THE VILLAGE OF PORT CHESTER, Respondent.— Judgment reversed and new trial granted, with costs to abide the event, upon the ground that the preliminary notice was sufficient under the authority of *Sheehy v. City of New York* (160 N. Y. 139) and *Sweeney v. City of New York* (225 id. 271). Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

MORRIS J. TERRY, Respondent, v. ISAAC G. TERRY and Others, Defendants, Impleaded with JOAB H. BANTON, as Trustee in Bankruptcy of JAMES T. WOOD, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ., concur.

BEATRICE B. VOM HOFE, Respondent, v. EDWIN C. VOM HOFE, Appellant.— Order modified by reducing the counsel fee allowed therein to \$500; and as thus modified affirmed, without costs. No opinion. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

MARGARET ZUNDT, Appellant, v. CRANFORD COMPANY, Respondent, Impleaded with BROOKLYN UNION GAS COMPANY, Defendant.— Order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ROSARIO

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ROVALLI, Appellant.— Judgment of conviction affirmed, by default. Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ., concur.

In the Matter of the Application of FRANK C. BAKER for Reinstatement as an Attorney.— Report of the official referee received and filed. Recommendation approved, and the applicant restored to the bar. Jenks, P. J., Putnam and Blackmar, JJ., concur; Kelly and Jaycox, JJ., dissent.

ALBERT M. OLM, Respondent, v. NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY, Appellant.— Motion for leave to appeal to the Court of Appeals denied. A stay of thirty days is granted to afford opportunity for application to the Court of Appeals for leave to appeal. Present — Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ.

MAX W. AMBERG and NATHAN FRIED, Respondents, v. WALTER C. ALLEN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ., concur.

FRANCOIS C. BERUBE, Appellant, v. ALBERT E. CASTLE and MARIETTA CASTLE, His Wife, Respondents.— Judgment reversed and new trial granted, with costs to appellant to abide the event. Upon the record presented to this court the interests of justice require that this judgment and the findings of fact and conclusions of law upon which it is based be reversed and set aside upon the ground that plaintiff was not given a fair trial of the issues presented by the pleadings. Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ., concur.

ISAAC BESSEL, Respondent, v. WILLIAM M. BARRETT, as President of the ADAMS EXPRESS COMPANY, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, on the ground that it was the duty of the plaintiff under his contract to water and feed the animals. Adequate facilities were provided for feeding and rest at Jersey City, and plaintiff in the exercise of reasonable care should have known of these facilities, and his failure to exercise such care precludes a recovery. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

ROBERT E. BREUER, Respondent, v. SAMUEL SALVIN and Others, Appellants.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Paragraphs 3, 4, 5 and 19 [of the complaint] stricken out, and the following clause from paragraph 9: "in a form prepared and printed by the defendants Samuel Salvin, Park Auto Exchange, Inc., and Emanuel Eichner." Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ., concur.

ANNA CONOBOY, as Administratrix, etc., of EDWARD CONOBOY, Deceased, Respondent, v. AMERICAN RAILWAY EXPRESS COMPANY, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, upon the ground that the verdict is contrary to the weight of evidence as to the negligence of the defendant. Jenks, P. J., Mills and Jaycox, JJ., concur; Rich and Blackmar, JJ., vote to affirm.

SAMUEL A. DUNN, Appellant, v. JAMES J. BROWNE, Respondent.— Judgment unanimously affirmed on reargument, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

YETTA FEIN and MAX KITTNER, Respondents, v. WILLIAM BRANDRISS, Appellant.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

THE FRANK SHEPARD COMPANY, Respondent, v. JENS C. OLSEN and Others, Defendants, Impleaded with GLENN A. BOYCE and JEANETTE A. BOYCE, His Wife, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

JACOB FRIEDMAN, Respondent, v. SAMUEL B. DAVIS and Others, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

In the Matter of the Petition of HOMER C. BABCOCK, for Probate of the Will of EDWARD F. LANG, Deceased. BERNARD J. MORAN, Executor, etc., Appellant; HENRY F. LANG, as Administrator, etc., of CONRAD LANG, Deceased, Respondent.— Order reversed in so far as it vacates and sets aside "in all respects" the decree of probate, and modified so as to provide that the decree be vacated and set aside as to the representative of Conrad Lang, deceased. No opinion. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

ROSALIE G. JONES, Individually, and as One of the Executors and Trustees etc., of MARY E. JONES, Deceased, Respondent, v. LOUISE E. JONES and Others, as Executors and Trustees, etc., and Others, Impleaded with HELENE LUCAS WOOD, Individually, Appellant. (Appeal No. 1.) — Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs, upon the ground that the complaint fails to state facts sufficient to constitute a cause of action against the defendant Helene Lucas Wood, individually. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

ROSALIE G. JONES, Individually, and as One of the Executors and Trustees, etc., of MARY E. JONES, Deceased, Respondent, v. LOUISE E. JONES and Others, as Executors and Trustees, etc., of MARY E. JONES, Deceased, and Others, Impleaded with HELENE LUCAS WOOD and Another, as Administrators, etc., of PHILIP L. JONES, Deceased, Appellants. (Appeal No. 2.) — Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs, upon the ground that causes of action are improperly united. The causes of action stated in the complaint are directed to be severed into two actions, in accordance with section 497 of the Code of Civil Procedure. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

ROSALIE G. JONES, Individually, and as One of the Executors and Trustees, etc., of MARY E. JONES, Deceased, Respondent, v. LOUISE E. JONES and Others, as Executors and Trustees, etc., of MARY E. JONES, Deceased, and Others, Impleaded with PHILIP L. JONES, JR., and Another, Appellants. (Appeal No. 3.) — Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs, upon the ground that causes of action are improperly united. The causes of action stated in the complaint are directed to be severed into two actions, in accordance

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with section 497 of the Code of Civil Procedure. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

WALTER OTIS LOOMIS, as Sole Executor, etc., of THERINA A. KING, Deceased, Respondent, v. FRANK C. DILDINE, Individually, and as Trustee, etc., Appellant.— Judgment unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

FRANCESCO MARRONE, Appellant, v. CHARLES S. SOMERS COAL COMPANY, INC., Respondent.— Judgment modified by allowing to the plaintiff damages computed at thirty cents per ton during the summer months and fifty cents per ton during the winter months, for the coal undelivered on the stipulated amount of seventy-eight tons a week during the year 1918. Additional findings should be made to support such modification, and as so modified the judgment is unanimously affirmed, with costs to the appellant. The statement of the account between the parties, as found by the referee, is correct except that the referee should have found that plaintiff had established a cause of action for a breach of contract. Under the circumstances of the case the failure of defendant to deliver to plaintiff the stipulated amount of coal — seventy-eight tons a week — was of such a nature as warranted plaintiff in refusing to proceed further and in suing for damages for a breach of the entire contract. (Pers. Prop. Law, § 126.)* The control of the supply of coal by the general government was not such as necessarily affected the terms and conditions of the contract; if it was, the only effect was to annul the contract, and this neither defendant nor plaintiff claims. The failure of plaintiff to pay for the coal weekly in accordance with the terms of the contract was not so material as to justify defendant in refusing to proceed further with the contract; nor did the defendant so refuse. As plaintiff had agreed to take the coal at the market price, the measure of damages is the commission or rebate of thirty cents a ton during the summer months and fifty cents a ton during the winter months upon the coal undelivered under the contract. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur. Settle findings and judgment before Mr. Justice Blackmar.

MARY MIZECK, as Administratrix, etc., of JOHN MIZECK, Deceased, Respondent, v. ANTHONY O'BOYLE, Appellant.— Judgment and order reversed and new trial granted, with costs to abide the event. (See *Fox v. Warner-Quinlan Asphalt Co.*, 204 N. Y. 240.) Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

SAMUEL NATHAN, Respondent, v. MORTIMER A. HARRISON, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

ROSE M. PALMER and LILLIAN PALMER, Appellants, v. ROTARY REALTY CO., INC., and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Mills, Rich, Kelly and Jaycox, JJ., concur.

ANDREA POLO, Appellant, v. JOHN H. SCHEIDT, Respondent.— Judgment

* Added by Laws of 1911, chap. 571.— [Rmp.]

reversed and new trial granted, with costs to abide the event. At the close of plaintiff's case the evidence showed a hiring of the plaintiff as broker, the procuring of a purchaser who finally agreed on terms with defendant, that defendant called in his lawyer to prepare the contract, that the lawyer suggested that as a commission was to be paid the purchase price should be raised so that the purchaser should really pay the commission and that defendant then insisted on increasing his price. We think plaintiff made out a *prima facie* case, and that it was error to nonsuit. Having procured a purchaser who agreed to defendant's terms the defendant had no right arbitrarily to refuse to carry out his agreement. (*Fuller v. Bradley Contracting Co.*, 183 App. Div. 6; *affd.*, 229 N. Y. 605.) Mills, Rich, Putnam, Kelly and Jaycox, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. THOMAS SAVINO, Appellant.— Judgment of conviction of the Court of Special Sessions affirmed. No opinion. Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ., concur.

SAFETY NIGHT LIGHT COMPANY, INC., Respondent, v. ANTONINA MACHCINSKI, Appellant, and Others, Defendants.— Order affirmed, with ten dollars costs and disbursements. We think the averments of fact in the affidavits were sufficient to authorize the justice to entertain the application for attachment. If appellant desires to dispute the facts or to obtain a reduction in the amount of the attachment she may apply to the Special Term for relief upon affidavits. Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ., concur.

The Resignation of Hon. MARTIN W. LITTLETON, as a Member of the Committee on Character, Accepted. The Hon. TOWNSEND SCUDDER is appointed a member of said committee. Present — Jenks, P. J., Mills, Putnam, Blackmar and Jaycox, JJ.

CESARINA BRITTELLI, Respondent, v. ANTONIO COMITO, Appellant.— Motion denied on condition that appellant perfect the appeal, place the cause on the calendar for the February term and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

NICOLA BRITTELLI, Respondent, v. ANTONIO COMITO, Appellant.— Motion denied on condition that appellant perfect the appeal, place the cause on the calendar for the February term and be ready for argument when reached; otherwise, motion granted, with ten dollars costs. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

CENTRAL SUGAR COMPANY, Appellant, v. ARTHUR H. LAMBORN and Others, Copartners, etc., Respondents.— Motion to continue stay granted on condition that plaintiff perfect the appeal, be ready for argument, and argue the same on Friday, January 28, 1921. Present — Jenks, P. J., Mills, Putnam, Blackmar and Jaycox, JJ.

In the Matter of the Application of THORNE BAKER for Admission to the Bar. (From the State of Ohio.) — Application granted. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

In the Matter of the Application of JOSHUA R. BENNETT for Admission

to the Bar. (From the District of Columbia.) — Application granted. Present — Jenks, P. J. Mills, Rich, Putnam and Kelly, JJ.

In the Matter of the Resignation of Hon. WILLIAM D. DICKEY, as Official Referee. — Resignation accepted, to take effect May 1, 1921. Present — Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ.

In the Matter of the Application of ELLIS G. KINKEAD for Admission to the Bar. (From the State of Ohio.) — Application granted. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

In the Matter of the Application and Petition of SMITH LOW and Others, Relative to Acquiring Rights, Easements, etc., under Fulton Street and Other Streets, for Subway Purposes, in the Borough of Brooklyn. NATIONAL CITY BANK OF BROOKLYN and Others, Appellants, v. THE CITY OF NEW YORK, Respondent. — Motion granted to the extent of requiring the city to furnish three typewritten copies of the evidence taken in the condemnation proceedings, from which the appellants will be at liberty to prepare their case for record on appeal, subject to the rules of this court, without costs of this motion. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

In the Matter of the Application of THOMAS E. SULLIVAN for Admission to the Bar. (From the State of Maine.) — Application granted. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

In the Matter of the Application of LOUIS TYROLER for Admission to the Bar. (From the State of Ohio.) — Application granted. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

In the Matter of the Application of SPIER WHITTAKER for Admission to the Bar. (From the State of Alabama.) — Application granted. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

THOMAS KENNEDY, Respondent, v. THOMAS F. GILLEN COMPANY, INC., Appellant. — Motions denied. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

FRANK A. LINCOLN, Respondent, v. "JOHN" R. MILLER, Appellant. — Motion granted on condition that appellant perfect the appeal, place the cause on the calendar for Monday, February 28, 1921, and be ready for argument when reached; otherwise, motion denied, with ten dollars costs. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

ALBERT MEYER, Appellant, v. MARY MEYER and LINCOLN SAVINGS BANK, Respondents. — Motion granted, without costs. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

GERALD MORRELL, Respondent, v. BROOKLYN BOROUGH GAS COMPANY, Appellant. (Appeal No. 1.) — Motion for leave to appeal to the Court of Appeals granted, and this court certifies the following questions of law: (1) On the complaint and moving affidavits, had the court at Special Term power to grant the injunction *pendente lite* against the defendant gas company, and to enjoin it from collecting the rate of one dollar and forty cents per 1,000 cubic feet of gas? (2) Had the Public Service Commission power or jurisdiction to fix a rate for this defendant to charge for gas in excess of the statutory maximum rate after that statutory rate had been duly adjudged to be confiscatory as to this particular company? (3) After such

determination that the maximum rate fixed by Laws of 1906, chapter 125, as amended by Laws of 1916, chapter 604,* as to this defendant, was confiscatory, unconstitutional and void, had defendant the power of itself to fix a rate of one dollar and forty cents per 1,000 cubic feet, and to enforce same as against local consumers like the plaintiff? Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

GERALD MORRELL, Respondent, v. BROOKLYN BOROUGH GAS COMPANY, Appellant. (Appeal No. 2.) — Motion for leave to appeal to the Court of Appeals granted, and this court certifies the following questions of law: (1) Had the city of New York any interest in this cause of action? (2) Is the city of New York a proper party so that the court at Spécial Term had power to grant its application to be joined as a party plaintiff herein? Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

GERALD MORRELL, Respondent, v. BROOKLYN BOROUGH GAS COMPANY, Appellant. (Appeal No. 3.) — Motion for leave to appeal to the Court of Appeals granted, and this court certifies the following question of law: Does the complaint state facts sufficient to constitute a cause of action? Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

ROSE M. PALMER and LILLIAN PALMER, Appellants, v. ROTARY REALTY COMPANY, INC., and Others, Respondents. — Motion denied, the recitals of the order being correct, without costs. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

R. NELSON SPATES, Respondent, v. HARRY H. MOSES, Appellant. — Motion denied, without costs. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

LULU WHITE, Formerly LULU FANNING, Respondent, v. JOHN W. FANNING, JR., Appellant. — Motions denied. Present — Jenks, P. J., Mills, Rich, Putnam and Kelly, JJ.

ROBERT L. FORBES, Respondent, v. MYRA C. HARRIS, Appellant. — Judgment and order of the City Court of New Rochelle affirmed, with costs. No opinion. Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ., concur.

SOLOMON FROMM, Respondent, v. GAETAN AJELLO, Appellant. — Order of the County Court of Kings county sustaining demurrer reversed, and the demurrer overruled, with ten dollars costs and disbursements. The counterclaim, if proved in its full extent and meaning, would give defendant the right to recover at least the expenses which defendant had incurred and which plaintiff is alleged to have agreed to supply. The fact that defendant claims a large amount of damages, which he probably will not be able to establish at the trial, is no reason for sustaining a demurrer to the counterclaim. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

KATIE HART, an Infant, by MARY WOLF, Her Guardian ad Litem, Respondent, v. JAMES HERVEY HART, Appellant. — Order affirmed, with ten dollars costs and disbursements. The power to refer such incidental questions

* Amd. by Laws of 1917, chap. 666. — [Rmp.]

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so as to inform the conscience of the court in adjusting the conditions and amount of alimony, is clearly given by sections 1015 and 827 of the Code of Civil Procedure. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

JAMES A. HOWELL, Appellant, v. FRANK E. NASH, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ.

In the Matter of the Petition of BURE R. BROWN, Respondent, v. HARRAL MULLIKEN, Appellant, and Others, Defendants.— Final order of the County Court of Westchester county reversed, with costs, and the proceeding dismissed, on the ground that the letter of the landlord dated September 6, 1917, removed the cancellation clause from the lease, and that thereafter it was not a part of the terms of the lease. When the renewal agreement between the parties was signed on September 17, 1918, extending the lease "at the present rental price and under the terms of the present lease," the "present lease" did not contain the cancellation clause. Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ., concur.

J. D. JOHNSON Co., INC., Respondent, v. CHARLES KEMLEIN, Appellant, Impleaded with JOHN BERRYMAN, Defendant.— Order of the County Court of Nassau county affirmed, without costs. No opinion. Jenks, P. J., Mills, Blackmar, Kelly and Jaycox, JJ., concur.

JANE I. LEMON and BURTON J. SCOTT, Respondents, v. MARY W. SCOTT, Individually and as Executrix, etc., of LEWIS B. SCOTT, Deceased, Appellant, Impleaded with FRANK SCOTT and Others, Defendants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Putnam, Blackmar and Kelly, JJ., concur; Rich, J., not voting.

MINA MAHLER, Appellant, v. BARBARA KRAEMER, Also Known as BARBARA COE, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

CHARLES MORSCHAUER, Respondent, v. GEORGE RINGLER & COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GARRETT E. FARRELL, Appellant.— Judgment of conviction of the County Court of Richmond county affirmed. No opinion. Rich, Putnam, Blackmar, Kelly and Jaycox, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. HARRY LEHMAN, Appellant.— Judgment of conviction by the County Court of Kings county reversed and a new trial ordered for error in permitting the district attorney after cross-examination of the defendant as to a watch on his person, to call the witness Silverman in contradiction to prove his ownership of this watch, thus tending to prove a distinct and independent crime. (*People v. Molineux*, 168 N. Y. 264, 336, 337; *People v. De Garmo*, 179 id. 130, 134; *People v. Buffom*, 214 id. 53, 60, 64.) The sinister effect of such testimony plainly violated the appellant's substantial rights. Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* LOUIS SPAET, Appellant, *v.* THE WARDEN OF THE CITY PRISON, KINGS COUNTY, Respondent.—Relator's conviction by the city magistrate, holding the Domestic Relations Court, was by a tribunal of competent jurisdiction. As to the relator its judgment is final until reversed on appeal. The writ of habeas corpus does not bring up for review the court's rulings as to the legal effect of the annulment decree entered by the Nevada court on the wife's default. (*People ex rel. Farrington v. Mensching*, 187 N. Y. 27; *People ex rel. Price v. Hayes*, 151 App. Div. 561.) The order of the justice at Special Term dismissing the writ is, therefore, affirmed. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

FREDERICK LINDE RYON, Respondent, *v.* JOHN WANAMAKER, New York, and JOHN J. DIXON, Appellants.—Order reversed, without costs, and motion denied, without costs, on condition that defendants within ten days stipulate to waive compliance by plaintiff with those two paragraphs of the order for the bill of particulars concerning which plaintiff is permitted to examine the witnesses. In default of such stipulation the order is affirmed, with ten dollars costs and disbursements. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

FRANCIS J. SCHLEICHER, Appellant, *v.* THE CITY OF NEW YORK and INTERBOROUGH RAPID TRANSIT COMPANY, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ., concur.

JACK L. SIMON, Respondent, *v.* WALDINGER & GLASER, INC., Appellant.—The answer does not deny the allegation of plaintiff's employment for a commission in addition to weekly wages. Alleging that the terms are not fully set forth in the complaint "and for the full and correct terms whereof the defendant begs leave to refer upon the trial;" and stating that the agreement has been modified "but that the terms of said agreement as so modified are not fully or correctly set forth in the complaint," without stating the change—thus leaving the facts covert—do not constitute a good denial. (*Wallach v. Commercial Fire Ins. Co. of N. Y.*, 12 Daly, 387; *Murray v. New York Ins. Co.*, 9 Abb. N. C. 309; *Matter of Bielby*, 91 Misc. Rep. 353, 364.) Under such an answer, even before interlocutory judgment, plaintiff may have an examination before trial as to the matters specified. The order is, therefore, affirmed, with ten dollars costs and disbursements. Jenks, P. J., Mills, Putnam, Blackmar and Kelly, JJ., concur.

MARY A. STOCKFLETH, as Administratrix, etc., of HENRY STOCKFLETH, Deceased, Respondent, *v.* GUY F. CLEGHORN, Appellant.—Judgment and order affirmed, with costs. No opinion. Rich, Kelly and Jaycox, JJ., concur; Mills, J., dissents on the ground that upon the theory upon which the case was submitted to the jury in the charge, viz., that the decedent stepped suddenly in front of the automobile, the verdict cannot be sustained, with whom Jenks, P. J., concurs.

CHARLES A. TOWNE, Respondent, *v.* E. W. BLISS COMPANY, Appellant.—Judgment and order reversed and new trial granted, costs to abide the

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event, unless within twenty days plaintiff consent to a reduction of the verdict to the sum of \$40,000, and to a modification of the judgment accordingly, in which event the judgment as so modified, and the order, are unanimously affirmed, without costs. Present — Jenks, P. J., Mills, Rich, Blackmar and Jaycox, JJ.

GEORGE W. VAN PELT, an Infant, by WILLIAM A. VAN PELT, His Guardian ad Litem, Appellant, v. ARTHUR B. CAPRON and Others, Respondents.— Judgment unanimously affirmed, with costs to each defendant appearing and filing a brief upon this appeal. Present — Jenks, P. J., Putnam, Blackmar, Kelly and Jaycox, JJ.

ARCHIBALD C. WEEKS, Appellant, v. LEONARD MILLER, Respondent.— We see no reason to interfere with the exercise of the court's discretion in declining to direct specific performance of the agreement of January 20, 1917, in which the defendant had granted many extensions of time without result except repeated delays by plaintiff. The judgment dismissing the complaint is, therefore, unanimously affirmed, with costs. Present — Jenks, P. J., Mills, Putnam, Kelly and Jaycox, JJ.

CLIFFORD E. H. WHITLOCK, Appellant, v. MARY A. RICHARDS, Respondent.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Jenks, P. J., Rich, Putnam, Blackmar and Kelly, JJ.

In the Matter of the Application of GEORGE GORDON for Admission to the Bar. (From the State of Georgia.) — Application granted. Present — Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ.

CENTRAL SUGAR COMPANY, Appellant, v. ARTHUR H. LAMBORN and Others, Copartners, etc., Respondents.— We see no reason for interfering with the discretion exercised by the Special Term. Therefore, the order is affirmed, with ten dollars costs and disbursements. No opinion. Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ., concur.

Decision by the Presiding Justice on Application to Appeal from the Appellate Term.

CLOTILDE BUDRACCO, Respondent, v. NATIONAL SURETY COMPANY, Appellant.— Application granted on condition that defendant file a surety company bond in the sum of \$1,500 to secure the judgment.

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In the Matter of the Judicial Settlement of the Estate of WILLIAM FALCON, Late of the Town of Champlain, Deceased.

HENRY W. FALCON, Appellant; GEORGE FALCON, as Executor, etc., of WILLIAM FALCON, Deceased, Respondent.

Surrogate's Court — jurisdiction — reinstatement of mortgage and cancellation of satisfaction piece — offset of lapsed claim against distributive share.

Appeal from a decree of the Surrogate's Court of the county of Clinton, entered in said Surrogate's Court December 1, 1919.

PER CURIAM: The Surrogate's Court exceeded its powers in providing for the reinstatement of the mortgage, the cancellation of the satisfaction piece, and the execution of an assignment of the mortgage by the mortgagee. Upon a rehearing the Surrogate's Court should consider the question whether the personal debt of the appellant to the estate, notwithstanding the lapse of time since the debt was contracted, should not be offset against his distributive share. All concur. Decree reversed, without costs, and matter remitted to the surrogate.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ROBERT L. WHITSON, JR., Appellant.

Crimes — rape, second degree — trial — charge — birth of child as corroborative of prosecuting witness — testimony.

Appeal by the defendant from a judgment of the County Court of Chemung county rendered October 3, 1919, convicting him of the crime of rape in the second degree.

Judgment of conviction affirmed. All concur, except Cochrane, J., dissenting, with an opinion.

COCHRANE, J. (dissenting): The indictment charges the defendant with having had sexual intercourse on or about May 27, 1918, in the city of Elmira, N. Y., with Julia Haskins, she being at that time fourteen years of age. She testified that the alleged crime was committed by the defendant on the date mentioned. A few hours thereafter he left for the army and was in military service until July, 1919, when he returned to Elmira. In the meantime and on February 12, 1919, Julia Haskins gave birth to a child. The defendant denied his guilt and gave evidence tending to show that others might have been the author of her trouble. The defendant could not be convicted on the uncorroborated evidence of Julia Haskins. (Penal Law, § 2013.) Corroborating evidence was introduced but much of it was given by the girl's mother whose credibility as a witness was of course open to attack. The difficulty with the case arises on the charge of the court to the jury. In his principal charge the learned county judge, referring to the birth of the child, said: "That is another circumstance that the prosecution claims that you should consider in arriving at the question of whether Julia's testimony has been sufficiently corroborated." At the conclusion of the charge the record discloses that the following occurred: "By Mr. Knapp: I ask your Honor to charge the jury that the fact that the Haskins girl gave birth to a child is no evidence to corroborate her testimony, that the defendant was the guilty party. By the Court: Well, I charge you that is one of the circumstances of the case. You may consider it in arriving at the guilt or innocence of the defendant. By Mr. Knapp: I take an exception to your Honor's refusal to charge the jury as requested, and I ask you to charge my proposition as asked. By the Court: I refuse to so charge. By Mr. Knapp: Then I take an exception to your Honor's refusal. By the Court: I charge you in connection with that, that fact standing alone is not sufficient to convict

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the defendant. As I said, that is one of the circumstances that has been shown here for you to consider. By Mr. Knapp: I will take an exception to your Honor's qualification in your statement to the jury on that point, and still ask you to charge as requested. By the Court: I still refuse. By Mr. Knapp; I take an exception." It has been many times held that pregnancy or birth of a child constitutes no corroboration of the complaining witness as to the guilt of a defendant. It is of course highly satisfactory evidence of the guilt of someone but it does not tend to connect a defendant with the commission of the crime. (*People v. Cole*, 134 App. Div. 759; *People v. Taleisnik*, 225 N. Y. 489, 493; *People v. Robertson*, 88 App. Div. 198; *People v. Shaw*, 158 id. 146; *People v. Bills*, 129 id. 798; *People v. Farina*, 134 id. 110, 113.) I think the defendant was entitled under the authorities cited to the charge as requested without any qualifications. The learned county judge did not even charge it substantially. His modifications instead of curing accentuated the error. He insisted on permitting the jury to consider the birth of the child as a circumstance "in arriving at the guilt or innocence of the defendant." That is exactly what he should have prevented. While that circumstance was potential in establishing the guilt of someone the defendant insisted that it did not tend to prove his guilt. The defendant is abundantly fortified by precedent in this contention. There was no dispute that the crime had been committed, the entire controversy consisting of an effort to fasten its commission on the defendant. The request to charge was, therefore, very pertinent. Its refusal was prejudicial and necessitates a reversal of the judgment. The judgment of conviction should be reversed and a new trial granted.

JOHN JOSEPH, Respondent, v. MARY M. MURRAY, Appellant.

Motor vehicles — contributory negligence — question for jury.

Appeal by the defendant from a judgment of the Supreme Court in favor of the plaintiff, entered in the Rensselaer county clerk's office June 3, 1920, upon the verdict of a jury for \$2,000, and also from an order entered June 14, 1920, denying a motion for a new trial made upon the minutes.

Judgment and order reversed on law and facts and new trial granted, with costs to the appellant to abide the event, on the ground that the verdict is against the weight of the evidence. All concur, except Kiley, J., dissenting, with a memorandum. The court disapproves of the finding that the plaintiff was free from contributory negligence.

KILEY, J. (dissenting): As I read this evidence, plaintiff was injured upon a street about twenty-five feet wide. The street ran north and south, and a double-track trolley road ran lengthwise through the street at the place where the accident occurred. The plaintiff was coming from the west toward the east; his destination was the Republican club house east of the tracks and street, and a little north from where he started on the west side of the street to cross it. He was going a little north of east in a diagonal direction; as he came to the street he looked south, saw a trolley headed north, and at the place where he stood would take the track farthest

east. East of the trolley car and beside it on the street was defendant's Pierce Arrow car. When plaintiff first looked they were standing still, as he claims, and about fifty feet south of him; he started across, and I gather from the evidence that about that time the trolley car started north, and as he reached the tracks it was within about fifteen feet of him; he crossed and the automobile was coming on with the car and intent on passing before it stopped again at a stop not far north of where it then was. Plaintiff threw up his right hand and attempted to cross, and was hit a short distance from the east curb. What were the conditions then and there? The driver of defendant's car says he did not see the plaintiff until he stepped from in front of the trolley to the left of the line of the auto, viz.: "He came right out close between my car and the trolley car." This indicates that the auto was close beside and well up toward the front end of the trolley car. Helen Murray, a witness for the defendant, swore that the distance between the street car and the curb was very short. The motorman stepped his car and the defendant's auto was stopped as soon as it could be stopped and the motorman swore the front of his car was at the rear end of the auto when the stop was made. The auto had a right-hand drive, and even so, the driver did not see the plaintiff, and when the auto was east of the car the plaintiff could not see it, as it was creeping up, seeking to get by. The plaintiff had about cleared the trolley's east track when the auto came in sight and at twenty miles an hour was upon him in the fraction of a second. The auto and trolley car were but a short distance apart; he could not retreat nor stay where he was; he would be hit in either event. It would seem that he was in an extreme and critical position. Can we say, as a matter of law, he was guilty of contributory negligence because he did not exercise better judgment? Was he guilty of contributory negligence, as a matter of law, for getting in that position? He had a right to start across the street when he started; he had a right to cross ahead of the trolley car when he did, and which he did in safety so far as the trolley was concerned; he had no warning that this automobile was coming along beyond this car out of sight, bent on passing it before the next trolley stop; no warning was sounded; this circumstance of extreme peril was not of his making; it seems to me that whether he exercised good judgment, under all of the circumstances, was a question of fact for the jury. *Knapp v. Barrett* (216 N. Y. 226) is a case where a pedestrian was injured while crossing a street. He had a judgment in the trial court which was affirmed in the Appellate Division [160 App. Div. 877], but was reversed in the Court of Appeals on account of errors in the charge of the court to the jury. The charge was to the effect that the plaintiff did not have to look. The Court of Appeals said that was error. In discussing the question the following holding was made and is found at page 230 of the opinion: "The law does not say how often he must look, or precisely how far, or when or from where. If, for example, he looks as he starts to cross, and the way seems clear, he is not bound as a matter of law to look again. The law does not even say that because he sees a wagon approaching, he must stop till it has passed. He may go forward unless it is close upon him; and whether he

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is negligent in going forward, will be a question for the jury." The question of plaintiff's contributory negligence was for the jury. Defendant's negligence was found by the jury and properly so. (*Moebius v. Hermann*, 108 N. Y. 349; *Baker v. Case*, 204 id. 92.) The judgment should be affirmed, with costs.

ERNEST BAKER, Respondent, v. GEORGE A. WELCOME, SR., AND GEORGE A. WELCOME, JR., Doing Business under the Style and Name of GEORGE A. WELCOME AND SON BUS LENS, Impleaded with THOMAS HALLINAN, Appellant.—Judgment and order unanimously affirmed, with costs, the court determining that if there was a technical error in the charge it was not prejudicial and should be disregarded under section 1317 of the Code of Civil Procedure.

ROBERT G. BAKER, Respondent, v. JAMES CONWAY, Appellant.—Judgment and order unanimously affirmed, with costs.

MARTHA DONNELLY, an Infant, by ANDREW DONNELLY, Her Guardian ad Litem, Respondent, v. HERBERT MORRIS, Appellant.—Judgment and order unanimously affirmed, with costs.

JOHN HAPP, Respondent, v. WILLIAM SKINNER, Appellant.—Order unanimously affirmed, with ten dollars costs and disbursements.

ALICE FULLER LEROY, Respondent, v. JOHN TOWNSEND, Appellant.—Judgment and order unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of GIUSEPPE INSANA, Respondent, for Compensation under the Workmen's Compensation Law, v. NORDENHOLT CORPORATION, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award reversed and claim dismissed on the authority of *Matter of Keator v. Rock Plaster Mfg. Co.* (224 N. Y. 549) and *Matter of Anderson v. Johnson Lighterage Co.* (Id. 539). All concur. [See 193 App. Div. 1, 929.]

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of Mrs. FRANCESCO CIRIELLO, Respondent, for Compensation for Herself and Children on Account of the Death of LAWRENCE CIRIELLO, Deceased, v. GREAT LAKES DREDGE AND DOCK COMPANY, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier, Appellants.—Award affirmed. All concur, except Coghane and H. T. Kellogg, JJ., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of LORETTA GUILLANA, Respondent, for Compensation under the Workmen's Compensation Law, v. MAX CHASIN and MAX COHEN, Employers, and ROYAL INDEMNITY COMPANY, Insurer, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARY MOONEY, Respondent, for Compensation under the Workmen's Compensation Law, v. DELMONICO'S, Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by JAMES J. McNULTY, Respondent, v. LOUIS CURTH & SONS, Employer, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier, Appellants.—Award modified so as to provide only for sixty-one weeks payment at nineteen dollars and twenty-three cents per week in addition to the prior award, and as so modified affirmed on the authority of *Matter of Eggleston v. Shinola Co.* (229 N. Y. 622). All concur.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARY E. CASTOR, Respondent, for Compensation to Herself under the Workmen's Compensation Law, for the Disability and for the Death of WALTER J. CASTOR, v. COLLEGIATE BAPTIST CHURCH OF THE COVENANT, Employer, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Insurance Carrier, Appellants.—Award for compensation reversed on the ground that the notice was not duly given, on the authority of *Dorb v. Stearns & Co.* (180 App. Div. 138) and *Colon v. American Linoleum Mfg. Co.* (184 id. 734), and award for death benefits affirmed. All concur.

In the Matter of the Probate of the Last Will and Testament of MARY F. STEPHENSON, Deceased. EDWARD G. FAILE and Others, Appellants; SILAS S. SHURTER, Respondent.—Decree unanimously affirmed, with costs.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of JOSEPH KOUSCH, Respondent, for Compensation under the Workmen's Compensation Law, v. H. G. ELLIS, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award modified by awarding compensation for one and one-half weeks, and as so modified affirmed. All concur.

TABITHA S. PIERCE, Respondent, v. JOHN W. ECKHART & COMPANY (a Corporation), Appellant, Impleaded with ABRAHAM COHEN and Others.—Judgment unanimously affirmed, with costs. Cochrane, J., not sitting.

JENNIE ROSS, Respondent, v. WILLIAM BECKERS, Appellant.—Judgment and order unanimously affirmed, with costs.

WARREN C. SIMONDS, Appellant, v. ADDA B. ROWE and Others, Respondents.—Judgment unanimously affirmed on the opinion of Van Kirk, J., at Special Term (110 Misc. Rep. 52).

BEN V. SMITH, Respondent, v. STANLEY & MACGIBBONS COMPANY, INC., Appellant.—Order and judgment unanimously affirmed, with costs.

JOSEPH I. STAHL, as Receiver of the Property of ISRAEL B. LEHRICH, Judgment Debtor, Respondent, v. ISRAEL B. LEHRICH, and Others, Appellants, Impleaded with ELLSWORTH BAKER.—Order modified by striking therefrom the recitals of a violation of the order in supplementary proceedings and of a fraudulent satisfaction of the judgment and by providing that the order of receivership shall not apply to any money actually paid to the defendant Teenie Lehrich by the defendant Frieder before it was granted, and as so modified affirmed, without costs. All concur.

ST. LAWRENCE CONSTRUCTION COMPANY, INC., Appellant, v. The STATE OF NEW YORK, Respondent.—Judgment unanimously affirmed, with costs.

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ELIZABETH SMITH, Respondent, v. LESTER KELLY and Others, Defendants. HARRISON C. MAYES, Individually and as Administrator with Will Annexed of the Estate of WATSON MAYES, Deceased, and Others, Appellants.— Order modified by striking therefrom the provisions requiring the appellants to give a bond in the sum of \$250, and as modified unanimously affirmed, with costs to the appellants to abide the event.

TOBY TORISCO, Respondent, v. LEHIGH VALLEY RAILROAD COMPANY, Appellant.— Judgment and order reversed and new trial granted, with costs to the appellant to abide the event, on the authority of *Minneapolis & St. Louis Railroad Co. v. Winters* (242 U. S. 353); *Gallagher v. New York Central R. R. Co.* (180 App. Div. 88; affd., 222 N. Y. 649) and *Matter of Parsons v. Delaware & Hudson Co.* (167 App. Div. 536). All concur. As the evidence stood it was error to refuse to consider the Pennsylvania Employers' Liability Law.

CHARLES J. BROWN, Respondent, v. WILSON GARDNER and Others, Appellants.— Motion granted.

FULTON COUNTY GAS AND ELECTRIC COMPANY, Respondent, v. ROCKWOOD MFG. CO., INC., Appellant.— Order unanimously affirmed, with costs.

WALKER D. HINES, Director General of Railroads, Appellant, v. JOSEPH YANKLOWITZ, Respondent.— Motions denied.

TRIPKO KRSTOVIC, Appellant, v. CHARLES H. VAN BUREN and Others, Respondents.— Motion denied.

In the Matter of the Final Judicial Settlement of the Account of FRANK B. WICKES, as Sole Administrator of the Personal Estate of GEORGE A. HOUGHTALING, Deceased.— Motion granted unless, within twenty days, the appellant files and serves printed case on appeal, places case on calendar for the next term, and pays ten dollars costs of this motion, in which case motion is denied, without costs.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by HYMAN WEINBERG, Respondent, v. EHRENBURG BRASS MANUFACTURING COMPANY, Employer, and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HYMAN KRINSKY, Respondent, for Compensation under the Workmen's Compensation Law, v. WARD & GOW, Employer, Appellant.— Motion granted.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MABEL J. LUTZ, Respondent, for Compensation under the Workmen's Compensation Law, Claimed to Be Due WILLIAM A. LUTZ, Her Husband, Deceased, v. THEO. P. HUFFMAN & Co., Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier, Appellants.— Motion denied.

In the Matter of the Application of the BOARD OF WATER SUPPLY OF THE CITY OF NEW YORK to Acquire Real Estate in the County of Ulster under Chapter 724 of the Laws of 1905, and the Acts Amendatory Thereof, for the Purpose of Providing an Additional Supply of Pure and Wholesome

Water for the Use of the City of New York. JEROME H. BUCK, Owner of Parcel 7, Claimant, Appellant; THE CITY OF NEW YORK, Respondent.— Motion for reargument denied. Motion for leave to appeal to Court of Appeals granted, and questions certified as follows: 1. Under section 15, chapter 724 of the Laws of 1905, has a claimant the right to move for the rejection or confirmation of a report of commissioners of appraisal before the expiration of the ten days within which the corporation counsel of the city of New York shall move for the confirmation thereof, as provided by said section 15? 2. Can a claimant move for the rejection of a report of commissioners of appraisal after the corporation counsel of the city of New York has within the statutory time provided by section 15 noticed same for confirmation?

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of HENRY DILG, Father, and ANNIE DILG, Mother, Respondents, for Compensation under the Workmen's Compensation Law, for the Death of JOHN DILG, Deceased, v. PYRENE MANUFACTURING COMPANY, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ANNA KLOTZ, Widow, and Others, Respondents, v. BUFFALO UNION FURNACE COMPANY, Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier, Appellants.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARY MOONEY, Respondent, for Compensation under the Workmen's Compensation Law, v. DELMONICO'S, Employer, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier, Appellants.— Motion denied.

In the Matter of the Application of CHARLES S. DEVOY for a Writ of Mandamus against CHARLES L. CRAIG, as Comptroller of the City of New York, and JAMES A. MCQUADE.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of NORMAN SMITH, Appellant, for Compensation to Himself under the Workmen's Compensation Law, v. THOMAS KEERY CO., INC., Employer, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Insurance Carrier, Respondents.— Motion granted by default.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ISRAEL FELDMAN, Employee, Respondent, for Compensation under the Workmen's Compensation Law, v. ELMONT CEMETERY, INC., Employer, Appellant.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by RICHARD J. ZIMMER, Respondent, v. CHARLES L. SEABURY & COMPANY, Employer, and the UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ARLIE F. PECK, Respondent, for Compensation under the Workmen's Compensation Law to Herself and Children, v. TASSELL & FAIR-

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BANKS, Employers, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Insurance Carrier, Appellants.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CHARLES E. HOOVER, Administrator, etc., of MARY ABRAHAM, Deceased, Respondent, for Compensation under the Workmen's Compensation Law, v. SAUQUOIT SPINNING COMPANY, Employer, and AITWA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.— Motion denied.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of KATHERINE ANTHUS, Respondent, for Compensation Arising Out of the Death of PAUL ANTHUS, under the Workmen's Compensation Law, v. THE RAIL JOINT COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Appellants.— Motion granted.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ANNA ERTTEL, the Surviving Wife of CHARLES ERTTEL, Deceased, Appellant, for Compensation under the Workmen's Compensation Law, v. JOHN PEIST SONS COMPANY, Employer, and LUMBIA MUTUAL INSURANCE COMPANY, Insurance Carrier, Respondents.— Motion denied, with leave to renew if so advised.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made by DORA RATTNER, Widow, on Behalf of Herself and Dependent Children under the Age of Eighteen Years, on Account of the Death of CHARLES D. RATTNER, Deceased, v. DAVID SCHIFF, Employer, and EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Insurance Carrier, Respondents.— Motion denied, without costs, with leave to renew if so advised.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARY HLUBOKY, Respondent, for Compensation under the Workmen's Compensation Law, for the Death of CHARLES HLUBOKY, v. PAUL KOPITZ, Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier, Appellants.— Award affirmed. All concur, except Cochrane, J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of JOHN J. TAFT, Respondent, for Compensation under the Workmen's Compensation Law, v. CHAMPLAIN SILK MILLS, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Appellants.— The average weekly wage was found to be twenty-two dollars and four cents, the amount which the employer stipulated. In making its computation the Commission allowed fifteen dollars per week. Two-thirds of twenty-two dollars and four cents is fourteen dollars and seventy cents which should be the weekly compensation and to that amount the award should be reduced. With this modification the award is affirmed. All concur.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law, Made on Account of the Death of FLOYD E. WHITTEMORE, Deceased, by

CHARLES E. WHITTEMORE, Father; and the Claim of GERTRUDE A. WHITTEMORE, Mother, Respondent, v. BINGHAMTON LIGHT, HEAT AND POWER COMPANY, Employer, and UTILITIES MUTUAL INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

J. HERMON MCLEAR, Respondent, v. JOSEPH BALMAT and Others, Appellants.—Motion for reargument denied. Motions for leave to appeal to the Court of Appeals granted. Van Kirk, J., not sitting.

BORDEN H. MILLS, as Trustee in Bankruptcy of the PLAYTHINGS CORPORATION, Bankrupt, Respondent, v. D. HARRY FRIEDMAN, Appellant.—Motion denied.

HARRIET E. OSTRANDER v. GEORGE N. OSTRANDER.—Order entered.

AARON POCKROSE and Others, Respondents, v. ISRAEL SHAPIRO, Appellant.—Motion granted, unless appellant within twenty days files and serves printed case on appeal and pays ten dollars costs of this motion, in which case motion is denied, without costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FREDERICK W. PARSONS, Appellant.—Order resettled so as to provide that the reversal is for errors of law only, and not for errors or questions of fact, or as a matter of discretion.

ELIZA J. PELLIS, Respondent, v. CARL KATZENSTEIN, Appellant.—Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARTHA E. STILES, Respondent, v. PATRICK HARVEY, as Sole Trustee of School District No. 10, Town of Altora, County of Clinton, State of New York, Appellant.—Order unanimously affirmed, with fifty dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HORACE M. HICKS, Respondent, v. THERON AKIN, as Mayor of the City of Amsterdam, N. Y., Appellant.—Order unanimously affirmed, with costs. Van Kirk, J., not sitting.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CARMELO MOLINO, Appellant.—Judgment of conviction reversed, and a new trial granted, on the ground that errors of law were committed by the court in the admission of evidence. All concur.

HELEN READE, Appellant, v. WILLIAM J. HALPIN and Others, Respondents.—Motion denied.

SPRINGFIELD BREWERIES COMPANY, Respondent, v. DEWEY MILLER and VIRGINIA L. MARTIN, Appellants.—Motion granted, unless appellant within twenty days files and serves printed case on appeal and pays ten dollars costs of this motion, in which case motion is denied, without costs.

CORNELIUS F. TIERNEY, Individually and as Administrator, etc., of MARY E. TIERNEY, Deceased, Respondent, v. GEORGE W. PERKINS, as President of the CIGARMAKERS' INTERNATIONAL UNION OF AMERICA, Appellant.—Motion granted.

MATHEW B. TARBELL, Respondent, v. CHARLES L. BANKS, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concur, except Kiley, J., dissenting.

MARGUERITE A. VALLIERE, as Administratrix, etc., of JOSEPH VALLIERE,

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Deceased, Respondent, v. LOUIS RIDGWAY, Appellant.— Order unanimously affirmed, with costs.

ROBERT WEIGEL and HENRY HILLEBRAND, Appellants, v. LESLIE COOK and MARGARET E. COOK, His Wife, Respondents.— Motion denied.

JONAS E. WILLIE, Respondent, v. JOSEPH LUCZKA, Appellant.— Motion denied.

FOURTH DEPARTMENT, JANUARY, 1921.

LENA J. REICHEL, as Administratrix, etc., Respondent, v. G. W. PERKINS, as President of CIGARMAKERS' INTERNATIONAL UNION, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

JOSEPH W. WILMES, Respondent, v. SIMEON E. FOURNIER, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

In the Matter of the Application of the GRADE CROSSING COMMISSIONERS OF THE CITY OF BUFFALO, to Ascertain the Compensation to Be Paid to the OWNERS of Lands, etc., Claimed to Be Owned by BUFFALO VENEER COMPANY and Others. (Proceeding No. 110.)— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

JOHN BEBACK, Appellant, Respondent, v. STEPHEN V. R. SPAULDING and Others, Appellants, and INTERNATIONAL RAILWAY COMPANY, Respondent.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

DANIEL F. STROBEL, Respondent, v. CHARLES E. SNYDER, Individually and as Executor, etc., Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs. Hubbs, J., not sitting.

HAZEL LADUQUE, an Infant, etc., Appellant, v. INTERNATIONAL RAILWAY COMPANY, Respondent.— Motion granted and appeal dismissed, with costs.

WILLIAM P. GREINER, Appellant, v. WEST SHORE RAILROAD COMPANY and Others, Respondents.— Appeal dismissed, without costs, upon stipulation filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. NICHOLAS ECONOMOUS, Appellant, v. JOHN J. COAKLEY, as Chief of Police of the City of Utica, New York, Respondent.— Appeal dismissed upon stipulation filed.

In the Matter of the Petition for Letters of Administration upon the Estate of FRANZ KAMPFL, Deceased.— Appeal dismissed, without costs, upon stipulation filed.

KATHERINE WEINZ, Appellant, v. JOHN WEINZ and Others, Respondents.— Appeal dismissed, without costs, upon stipulation filed.

CARL EMIL MOLLER and Others, Respondents, v. CLARE A. PICKARD and Others, Appellants.— Order entered substituting Jane Elizabeth Bloomquist, as administratrix of the personal estate of Charles A. Bloomquist, deceased, as plaintiff, respondent, herein, in the place of said Charles A. Bloomquist, deceased.

ROBERT K. HIER and Another, Respondents, v. EDGAR M. WIGHTMAN and Another, Appellants.—Motion to dismiss appeal denied, without costs, and case set down for argument Monday of the third week of this term, Davis, J., not sitting.

In the Matter of the APPOINTMENT OF OFFICIAL REFEREES, Pursuant to Section 115 of the Judiciary Law.—Hon. William M. Ross, Hon. Edgar C. Emerson and Hon. Pascal C. J. De Angelis are hereby appointed official referees, pursuant to section 115 of the Judiciary Law.*

JENS JENSEN, Appellant, v. ISABELLE BLOOD, Respondent.—Order reversed, with costs, and verdict of jury reinstated, with costs. All concur.

MELBOURNE A. GOOCH, Respondent, v. ELIZABETH J. EATON and Another, Appellants.—Order affirmed, with ten dollars costs and disbursements. All concur.

CLYDE G. SPETZ and Another, Respondents, v. DOMINICO FLAGELLA and Another, Appellants.—Order reversed, with ten dollars costs and disbursements, and demurrer sustained, with ten dollars costs, with leave to the plaintiff to serve an amended complaint within twenty days, upon payment of the costs of the motion and of this appeal. All concur.

CAROLINE FITZGERALD, as Executrix, etc., of JENNIE E. FITZGERALD, Deceased, Respondent, v. THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concur.

In the Matter of the Probate of the Last Will and Testament of WILLIAM JOHNSON, Deceased. WILLIAM C. GOSNELL, Executor, etc., Appellant; ANNIE WILLIAMSON and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements. All concur.

HARRISON B. MCGRAW, as Assignee for the Benefit of Creditors of GEORGE H. WORTHINGTON, Respondent, v. FRANK A. HALLADAY, as Executor, etc., of ALICE F. HALLADAY, Deceased, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FRANK PEART, Appellant.—Judgment of conviction affirmed. All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. RONALD PEART, Appellant.—Judgment of conviction affirmed. All concur.

In the Matter of the Judicial Settlement of the Accounts of JAMES J. MCCROHAN and Others, as Executors, etc., of MARY MCCROHAN, Deceased. JAMES J. MCCROHAN, Individually and as Executor, etc., Appellant; J. DAVID ENRIGHT, Executor, etc., Respondent.—Order affirmed, with ten dollars costs and disbursements. All concur.

JOSEPH M. RAUB, Respondent, v. FRANK J. BABCOCK and Others, as Executors, etc., of MARY J. RAUB, Deceased, and Others, Appellants, Impleaded with Another.—Judgment affirmed, with costs. Held, we are of the opinion that the facts bring this case within the exception contained in section 94 of the Real Property Law, and that the cause of action is not barred by the Statute of Limitations; also that it may be conceded that some

* Amd. by Laws of 1920, chap. 761.—[REp.]

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of the evidence received was in violation of section 829 of the Code of Civil Procedure; yet we do not deem the error prejudicial, because there is ample undisputed, competent evidence to sustain the findings made, and on the merits the judgment is right. All concur.

HERBERT C. POTTER, Respondent, v. INTERNATIONAL RAILWAY COMPANY and NORWOOD GARAGE, Appellants.— Judgment and orders affirmed, with costs. All concur.

GOLDA M. POTTER, Respondent, v. INTERNATIONAL RAILWAY COMPANY and NORWOOD GARAGE, Appellants.— Judgment and orders affirmed, with costs. All concur.

LUOT M. WANAMAKER, Respondent, v. WYOMING VALLEY FIRE INSURANCE COMPANY, Appellant, Impleaded with Another.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. All concur.

MILTON J. COLE, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event. All concur.

BLANCHE COLE, Respondent, v. INTERNATIONAL RAILWAY COMPANY, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event. All concur.

JANE A. SCHEFFER, Appellant, v. INTERNATIONAL RAILWAY COMPANY, Respondent.— Judgment and order affirmed, with costs. All concur.

LASARUS KUPELLAN, Respondent, v. FREDERICK W. ANDREWS, Appellant.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

DANIEL GRIFFITHS, Respondent, v. WALKER D. HINES, as Director General of Railroads, Appellant.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

RUDOLPH FRANKLIN and Another, Appellants, v. WALTER L. ROSS, as Receiver of TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, and Others, Respondents.— Appeal dismissed, without costs, upon stipulation filed.

DANIEL COGS, Respondent, v. EDWARD JORDAN, Appellant.— Appeal dismissed, without costs, upon stipulation filed.

ARTHUR J. MAHON, Appellant, v. JAMES M. E. O'GRADY and Others, Respondents.— Motion granted and appeal dismissed, with costs.

CARL EMIL MOLLER and Others, Respondents, v. CLARE A. PICKARD and Another, Appellants.— Appeal dismissed unless appellants shall file and serve the printed briefs on appeal and pay to respondents' attorneys ten dollars within twenty days, and shall be ready to argue the appeal on March eighth.

OTIS W. KENYON, Respondent, v. JOSEPH G. ROBIN, Appellant, Impleaded with Others.— Order reversed, with ten dollars costs and disbursements, and motion granted to dismiss complaint as to the defendant Robin, with costs. All concur.

GUY W. ELLIS, Respondent, v. C. F. GARFIELD REAL ESTATE COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur.

WILLARD E. HOOKWAY, Respondent, v. DENNIS E. LILLIS and Others, Appellants.— Orders affirmed, with ten dollars costs and disbursements, with leave to the defendants to plead over within twenty days upon payment of the costs of the motion and of this appeal. All concur.

THE PEOPLE OF THE STATE OF NEW YORK on Complaint of ROBERT W. ASHLEY, Overseer of the Poor of the Town of Lyons, New York, Respondent, v. ARTHUR J. GREENAGLE, Appellant.— Order affirmed, with costs, as provided in section 873 of the Code of Criminal Procedure. All concur.

In the Matter of the Estate of JOHN DOMKOWSKI, Deceased. HORROCKS DESK COMPANY, Appellant; JAMES W. GRAVES, Administrator, etc., Respondent.— Order affirmed, with ten dollars costs and disbursements. All concur.

ANTONIO MADONIA, Appellant, v. HOWARD SHERMAN, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concur.

In the Matter of the Final Accounting of JAMES H. MCNAIR, as Surviving Committee of JANE MCNAIR, an Incompetent Person.— Appeal dismissed, without costs, upon stipulation filed.

HUBERT S. SMITH, Appellant, v. CHARLES F. LILLEY, Respondent.— Appeal dismissed, without costs, upon stipulation filed.

A. WENTWORTH ERICKSON, Respondent, v. SILVANUS J. MACY, Appellant.— Motion for leave to appeal to Court of Appeals granted, and questions for review certified.

MARTIN J. MCGAHAN and Another, as Administrators, etc., of EVELYN MCGAHAN, Deceased, Appellants, v. THE STATE OF NEW YORK, Respondent.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

WILLIAM C. CORNWELL, Appellant, v. THOMAS F. SANFORD, Respondent.— Motion for leave to appeal to Court of Appeals denied, with ten dollars costs.

CENTRAL TRUST COMPANY OF NEW YORK, Plaintiff, v. PITTSBURGH, SHAWMUT and NORTHERN RAILROAD COMPANY and Others, Defendants.— The appeal taken by Henry S. Hastings, as receiver in person, from an order entered November 20, 1920, is hereby transferred to the Appellate Division, Second Department, in furtherance of justice, pursuant to the provisions of section 231 of the Code of Civil Procedure. Clark, J., not sitting.

In the Matter of the Application of RAYMOND W. CULROSS for a Determination as to the Construction, etc., of the Last Will and Testament of JOSEPH HALL, Deceased. WILLIAM T. HALL and Another, Appellants; RAYMOND W. CULROSS and Others, Respondents.— Decree affirmed, with costs. All concur.

JOHN F. LLOYD, Respondent, v. MARY P. JOHNSON, Appellant.— Judgment and order affirmed, with costs. All concur.

AUGUST BECKER, Appellant, v. WILLIAM MCVAY and Another, Respondents.— Order affirmed, with ten dollars costs and disbursements. All concur.

FORTUNATO MASTRANGELO, as Administrator, etc., Appellant, v. ARTHUR L. DENISON, Respondent.— Judgment and order affirmed, with costs. All concur.

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HARRIET A. GOODE, Respondent, v. HELEN SHARTLE, Appellant.— Judgment and order reversed and new trial granted, with costs to appellant to abide event, unless the plaintiff shall, within ten days, stipulate to reduce the verdict to the sum of \$10,000 as of the date of the rendition thereof, in which event the judgment is modified accordingly, and, as so modified, is, together with the order, affirmed, without costs of this appeal to either party. Held, that the verdict is against the weight of the evidence upon the question of damages and is excessive. All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ROBERT F. BURNS, Appellant.— Judgment of conviction affirmed. All concur.

OSWEGO MILLING COMPANY, Respondent, v. GILBERT & NICHOLS COMPANY, Appellant.— Judgment and order affirmed, with costs. All concur.

LAVERNE D. CONDERMAN, Respondent, v. WILLIAM M. NEPHEW, Appellant.— Order affirmed, with costs. All concur.

CHARLES A. FINNEGAN, Respondent, v. GEORGE S. BUCK and Others, as and Constituting the Council of the City of Buffalo and Others, Appellants.— Order reversed, with ten dollars costs and disbursements, and order continuing injunction *pendente lite* vacated and set aside, with ten dollars costs, as a matter of law and not in the exercise of any discretion, this court being of the opinion that the *Legal Daily* referred to in the moving papers is a paper which the defendant city and its officers are authorized to designate as the official paper of the city in which legal notices may be published, as provided in the charter of said city.* All concur.

SARAH E. WOOD, Plaintiff, v. WALBURGA BRUNETT and Another, Respondents, Impleaded with Another. FRANCIS A. WERTHMAN and Another, Appellants.— Order affirmed, with ten dollars costs and disbursements. All concur.

WILLIAM J. HUNT, Appellant, v. NEW YORK CENTRAL RAILROAD COMPANY, Respondent.— Appeal dismissed, without costs, upon stipulation filed.

MOVSES BOGHOSIAN, Respondent, v. JOSEPH DAVIS and Another, Appellants.— Motion granted and appeal dismissed, with costs.

B. G. H. METAL MFG. CO., INC., Appellant, v. EUGENE J. McVoy, Respondent.— Order modified by imposing as terms that the defendant pay all costs and disbursements up to the time of the allowance of the amendment, together with ten dollars costs of the motion, and as so modified, order affirmed, without costs. All concur.

ROCHESTER BILL POSTING COMPANY, Appellant, v. JOSEPH SORRENTINO and Another, Respondents.— Motion granted, permitting appellant to withdraw appeal, without costs.

ANNA ALLEN, as Administratrix, etc., Respondent, v. WALKER D. HINES, as Director General of Railroads, Appellant.— Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to Court of Appeals denied.

ROBERT K. HIER and Another, Respondents, v. EDGAR M. WIGHTMAN and Another, Appellants.— Motion to dismiss appeal denied, without costs.

* See Laws of 1914, chap. 217, § 25.—[R.R.P.]

In the Matter of the Application of SYRACUSE AND SUBURBAN RAILROAD COMPANY for the Appointment of Three Commissioners to Determine Whether Its Railroad Ought to Be Constructed and Operated in Pine Street between East Genesee Street and East Fayette Street, in the City of Syracuse, N. Y.—Motion granted and Henry Fanda, Frank J. Schnauber and Thomas W. Dixon, all of Syracuse, N. Y., appointed as such commissioners.

CHARLES A. FINNEGAN, Respondent, v. GEORGE S. BUCK and Others, as and Constituting the Council of the City of Buffalo and Others, Appellants.—Motion for leave to appeal to the Court of Appeals granted, and question for review certified.

FIRST DEPARTMENT, FEBRUARY, 1921.

GABRIEL HERMAN, Respondent, v. LOUIS HERMAN, Appellant.

Accounting—transfer in fraud of creditors—suit in equity by transferor.

Appeal by defendant from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of December, 1919, compelling the defendant to account in equity as plaintiff's copartner in the business of slate, tile and marble. The copartnership name was the Herman Slate Company.

Judgment affirmed, with costs. No opinion. Present—Clark, P. J., Dowling, Smith, Page and Greenbaum, JJ.; Smith, J., dissenting.

SMITH, J. (dissenting): The action is for an accounting. The defendant by answer alleges, among other things, that prior to April 24, 1916, the plaintiff, for a valuable consideration, conveyed all his rights, title and interest in the partnership business, its assets, outstanding accounts, good will and everything else thereunto belonging to the defendant. Such a bill of sale was received in evidence. The plaintiff had had trouble with his wife. She had begun an action for separation against him and in that action she had been allowed \$100 for counsel fee and \$25 a week alimony. In October, 1915, the wife had made a motion in the Supreme Court for the appointment of a receiver of the plaintiff's property in sequestration proceedings. This was returnable upon October 26, 1915. On the twenty-fifth day of October, the day prior to that on which the motion was returnable, this bill of sale was made. The trial court has found that this bill of sale was executed by the plaintiff to the defendant, upon the defendant agreeing to hold the said interest of the plaintiff in said copartnership intact for his use and benefit, and upon the distinct understanding and agreement that the said bill of sale was for the purpose of protecting the business, and that the plaintiff would continue as a copartner in said business and to all the rights incidental thereto. The plaintiff in his examination was asked to give the circumstances under which the paper was executed. He testified: "I had family trouble, and I was being bothered by my wife. I took it up with my brother and told him the conditions. He knew I was being troubled and being bothered. He told me to make an assignment to him of my

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interests to protect the business interests between us. I say, I will consider it, and speak to my attorney about it and see what he says about it." He was then asked if he had any further conversation with his brother at the time he gave him the bill of sale. He answered: "I told him that he was to hold this only in case we were bothered in an emergency." He then swears that he signed the checks as before, that he continued supervision of the work and he carried out the same actions and performed the same work and exercised the same functions as he did prior to the execution of the paper until April, 1916. He was further asked: "Q. And you testify that the purpose of executing the paper was the result of a conversation between you and your brother to protect you against any action that your wife might take? A. Exactly. Q. And did he say that he would accept the bill of sale under those conditions? A. He did. By the Court: Q. What did he say, as well as you remember his words, or in substance? A. He said he would simply hold this in case any trouble would arise, because they would continue to do business and sign checks as if this paper had never existed." Upon cross-examination he was asked: "Q. What trouble did you expect from your wife? A. The arrears of alimony. Q. And what did you expect was going to happen with respect to the arrears of alimony? A. Sequestration proceedings. Q. The appointment of a receiver and sequestration proceedings? A. Yes. Q. You know what sequestration proceedings are, don't you? A. I think I do. Q. So as to avoid sequestration proceedings, you tell the court you and your brother had a conversation which resulted in the making of this bill of sale, is that correct? A. Yes." He was further asked: "Q. Did you or did you not give that bill of sale to your brother in order to prevent your wife obtaining anything through sequestration proceedings? A. No. Q. Now, didn't you tell the Court a moment ago that that was the object of it? A. No. Q. Did you or did you not? A. No, I did not mean it. Q. Did you or did you not use the word sequestration? A. I did not, you used it. Q. You did not use the word at all? A. No, I simply said that I gave that instrument to my brother to protect the business. Q. Against what? A. Against any troubles that might arise between me and my wife. Q. What trouble did you anticipate from your wife? A. It may possibly have been some trouble, if she would want money, but there had not been any. Q. Didn't you tell the Court before when I asked you that very question, what was the trouble, and you answered sequestration proceedings? A. That she may start." The evidence further shows that there was then accumulated alimony amounting to \$255 and that upon the execution of the bill of sale there was withdrawn from the business by the plaintiff \$255 which was paid to his wife in settlement of the alimony up to that date. One contention of the defendant upon this appeal is that the purpose of this transfer was to hinder and delay the wife in the collection of her alimony and that the bill of sale having been given for that illegal purpose, the plaintiff does not come into a court of equity with clean hands and the court will leave the parties where it finds them. The learned trial judge in his opinion states that the sum of \$255 was a ridiculously inadequate consideration for the

plaintiff's interest in the partnership and that the plaintiff's contention as to the purpose of the bill of sale had been established. To the defendant's argument that plaintiff has not come into court with clean hands and that the transaction was illegal, the court said, in the first place, that such a defense was not pleaded in the answer, and, secondly, that if the court should give heed to this prayer of the defendant, the result would be that the defendant, by means of a participation in the fraud would largely profit. To the first proposition the case of *Landes v. Hart* (131 App. Div. 6) seems to be a complete answer. In that case this court unanimously held: "Objection is made that the defendant's answer contains only a general denial and that the illegality of the contract must be affirmatively pleaded. Where from the plaintiff's own proof a contract is shown to be void as contrary to public policy a general denial is sufficient." In *Sprague v. Webb* (168 App. Div. 292), where there was no plea in defendant's answer, this court held that where, irrespective of the pleading it appears from the evidence that the contract is opposed to good morals or sound public good, the court will, of its own motion, deny relief thereunder. It is true, further, as stated by the trial judge in his opinion, that the defendant will make large profits from the transaction, but that fact I deem immaterial in the application of this principle. The court cares nothing what may be the result of this action. It simply denies equitable relief to a party who has attempted to put his property beyond the reach of a creditor, or of one who is liable to become a creditor. He then is confronted by the maxim of equity clearly established that the plaintiff must come into equity with clean hands. It is further contended by the plaintiff that the arrears of alimony amounting to \$255 were then paid, but that cannot be an answer to the defendant's position, because the obligation was a continuing one to pay \$25 a week thereafter. This attempted subterfuge was clearly not intended to thwart the plaintiff's wife in her collection of the arrears in alimony, because the payment of those arrears was contemplated and effected by the transaction itself. The intent was clear and is practically conceded upon the trial and upon this argument that the attempt was to put this property beyond the reach of the plaintiff's wife in any proceeding she might take to enforce any alimony subsequently accruing. That the transfer made for the purpose of hindering and delaying anticipated creditors is void as to those creditors is well established, and it has been held that a conveyance made to protect the property of the transferor against the claims for alimony is void, although made before the institution of divorce proceedings. In *Livermore v. Boutelle & Tenny* (77 Mass. 217) it is held that a conveyance of real estate by a husband, after he has committed adultery, though before his wife has filed a libel for divorce, is void, if made to prevent her from recovering such alimony as the court may decree to her. (See, also, *Demarest v. House*, 91 Hun, 290; 20 Cyc. 431.) It is further urged that this conveyance was not of the plaintiff's entire property, but that he had left an interest in two pieces of real estate, and that the plaintiff cannot recover except by showing that this real estate was not sufficient to answer any claims for alimony which might thereafter accrue. The proof, however, is directly to the contrary.

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It is true, as stipulated by the parties, that there were two pieces of real estate that stood in the names of Louis Herman and Gabriel Herman, the parties to this action. The plaintiff himself swears, however, that this was partnership property and treated as such, that it was purchased with partnership funds, that the rents were collected and put into the partnership account and that the expenses were paid out of the partnership business. This bill of sale which it is sought here to impeach is executed under seal and assigns: "All my right, title and interest in and to the partnership business, assets, outstanding accounts, good will and everything else, belonging to the partnership, between me and the said Louis Herman, who do business, both as the Herman Slate Co., and Hecla Slate Co., *intending hereby to sell to said Louis Herman, everything belonging to said partnership.*" This bill of sale as between the parties clearly passes the legal title in this partnership real estate to the defendant. There is not one word of proof that the plaintiff after the transfer retained any property whatsoever of his own. He is specifically asked as to his other sources of income and the only other source of income which he mentioned in response to that question is income which he might receive as commissions from other parties for procuring contracts. Moreover, the plaintiff was asked upon the stand whether or not immediately after October 26, 1915, he did not fall in arrears again with his alimony, and his answer was "Some time later, yes. Q. Well, isn't it a fact that you paid practically nothing?" To this plaintiff's counsel objected and upon his objection only was the question withdrawn. It cannot be claimed, therefore, with his avowed intent to withdraw this property from the reach of his wife in any claim for alimony which she might thereafter have, and having transferred all his property and having been shown to have fallen in arrears in the payment of his alimony, that this instrument was not given to hinder, delay and defraud this anticipated creditor. It seems hardly necessary at this late date to cite authorities for the proposition that a transfer made to defraud creditors is good as between the parties and that a court of equity will not aid the transferor to recover back the property. In *Ford v. Harrington* (16 N. Y. 288) it is said: "The general rule that courts will, under such circumstances, extend no remedy to a grantor or vendor of property to recover back from the grantee or vendee the property thus transferred, although the transfer is without consideration, is too well settled to be now called in question." In that case, however, the transfer was made by a party to his attorney upon the advice of the attorney, and it was held that that confidential relation was such as to relieve the transaction of this rule in equity, because the parties were not *in pari delicto*. In *Randall v. Howard* (2 Black, 585) it was held in reference to just such a transaction: "A Court of Equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim '*in pari delicto potior est conditio defendantis*' must prevail. It is against the policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another." (Citing 1 Story's Eq. Juris. § 298 and cases.) In *Dent v. Ferguson* (132 U. S.

64) the same principle is held, and a quotation from the opinion of Mr. Justice Davis in *Wheeler v. Sage* (1 Wall. 529) says: "Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him." And then, after a review of the evidence in that case, the opinion concluded in these words: "A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies." The rule is also laid down as follows: "A conveyance by a debtor, deeply indebted, and in anticipation of decrees and judgments which, added to existing incumbrances, will amount to the value of the property conveyed, will lead a court of equity to presume that the instrument was executed in fraud of the creditors." It is true that an exception is made in cases between attorneys and clients and sometimes between parents and children where the conveyance was induced by the confidential relation, but there can be no such claim here asserted. The plaintiff did not make the conveyance to the copartner until he had taken advice with his lawyer and the transfer of all the property of the partnership was not induced by the confidential relation. That the parties are still *in pari delicto* is demonstrated by the reasoning in *Wait on Fraudulent Conveyances* (3d ed., § 401). I recommend that the judgment be reversed and the complaint dismissed.

PHILIP HERBST, Respondent, v. SAMUEL BELLACK, Appellant.

Trial — verdict — excessive damages.

Appeal from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Bronx on the 14th day of April, 1920, upon a verdict for \$22,500, and also from an order denying a motion for a new trial.

PER CURIAM: In view of the failure of the plaintiff to meet the testimony of the defendant's expert as to a certain disease being the producing cause of the condition of the eye of which plaintiff complains, we think this verdict was excessive. It did not appear that the condition of the eye from which plaintiff is suffering was solely due to the accident. The judgment and order should, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event, unless plaintiff stipulates to reduce the judgment as entered to the sum of \$15,142.70; in which event the judgment as so modified and the order appealed from are affirmed, without costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ. Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered to the sum of \$15,142.70; in which event the judgment as so modified and the order appealed from are affirmed, without costs. Settle order on notice.

STANDISH CHARD, as Receiver in Supplementary Proceedings of CORNELIUS J. SULLIVAN, Respondent, v. RYAN-PARKER CONSTRUCTION COMPANY, Appellant.

Contracts — when not corrupt or against public policy.

Appeal from a judgment of the Supreme Court in favor of the plaintiff, entered in the New York county clerk's office on the 28th day of July, 1919, on the verdict of a jury, and from an order entered in said clerk's office on the 6th day of October, 1919, denying a motion for a new trial.

Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.; Clarke, P. J., and Greenbaum, dissenting.

CLARKE, P. J. (dissenting): I dissent upon the ground that the finding of the jury that the contract in suit is not illegal and against public policy is clearly against the evidence and the weight thereof. It seems clear to me that its sole purpose was to engage political aid and that it obviously tended to secret and improper resort to public officers.

SUSAN D. BRIGHTSON, Appellant, v. JOHN CLAFLIN, Respondent.

Pleading — technical omission therein.

Appeal from final judgment of the Supreme Court in favor of defendant, entered in the office of the clerk of the county of New York on the 15th day of January, 1920, upon the report of a referee.

Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.; Laughlin, J., dissenting.

LAUGHLIN, J. (dissenting): I dissent upon the ground that, in my opinion, the defendant should have pleaded that the stock was held by the company as collateral for the note. (See *Barber v. Ellingwood*, No. 2, 137 App. Div. 704, 714.) Were it not for this technical omission so to plead, I would vote for affirmance.

BONWIT, TELLER & Co., Appellant, v. ELIZABETH K. HOSFORD, Respondent.— Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

AARON MONOWITZ, Appellant, v. JAMES BRACKENRIDGE and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

IDA WARONEN, as Administratrix, etc., Respondent, v. ARTHUR McMULLEN COMPANY and Another, Defendants, Impleaded with NEW YORK, WEST-CHESTER AND BOSTON RAILWAY COMPANY, Appellant.— Order affirmed,

with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. SAM SCHORR, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ISAAC KASTON, Respondent, v. NATHAN ZIMMERMAN, Defendant, Impleaded with GEORGE ORLOVE & Co., Inc., Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.; Dowling and Page, JJ., dissenting and voting to reverse the judgment and dismiss the complaint upon the ground that, in their opinion, the case upon the evidence is not brought within the rule laid down in either the majority or minority opinion of this court on the prior appeal in this case (192 App. Div. 511).

NATHAN DORFMAN and Another, Respondents, v. DAVID STOFF, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JULIAN LAPINSKY, Respondent, v. L. W. GORTSCHUIS & COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HERMAN BERMAN, Respondent, v. CHARLES M. BERNSTEIN, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JAY G. WILBRAHAM, Appellant, v. JENNY STAFFORD MURPHEY, Respondent.— Order affirmed, with ten dollars costs and disbursements, with leave to plaintiff to serve an amended complaint on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM SELONEK, Appellant, v. INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.— Order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS HOGAN, an Infant, by MARY HOGAN, His Guardian ad Litem, Respondent, v. BIRNS EXPRESS, INC., Appellant.— Judgment reversed, with costs, and complaint dismissed, with costs, on the authority of *Rolfe v. Hewitt* (227 N. Y. 486). Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MABEL I. BRADFORD, Respondent, v. BLACK AND WHITE CAB COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MAURICE O'MEARA COMPANY, Respondent, v. CONTINENTAL FOLDING PAPER BOX COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

COMMISSIONER OF PUBLIC CHARITIES OF THE CITY OF NEW YORK on Complaint of MARY STEINMAN, Respondent, v. HARRY TULLY, Appellant.— Order affirmed. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

GEORGE U. HIND and Another, Copartners, Doing Business under the

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NAME OF HIND-ROLPH & Co., Respondents, v. A. KLIPSTEIN & Co., Appellant.— Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and at Special Term. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

BERTHA HELLMAN, as Administratrix, etc., of EDWARD HELLMAN, Deceased, Respondent, v. FRED SCHNEIDER, INC., Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS BLAKE, Respondent, v. THOMAS & BUCKLEY HOISTING COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.; Clarke, P. J., dissenting.

NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, Respondent, v. THE GLOBE AND RUTGERS FIRE INSURANCE COMPANY, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.; Smith, J., dissenting and voting for modification by reducing the judgment by six-thirty-fifths, the amount that has been paid on a fire loss.

EDWARD V. ODELL, Appellant, v. JOHN F. GILCHRIST, as Commissioner of Licenses of the City of New York, Respondent.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY A. COCHRANE, Plaintiff, v. NEW YORK LIFE INSURANCE COMPANY, Defendant.— Exceptions overruled and judgment ordered to be entered on dismissal of complaint. No opinion. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LOUIS E. HERZ, as Stockholder of the AUTOMOBILE MECHANICS CORPORATION, Suing for Himself and Others Similarly Situated, Respondent, v. AUTOMOBILE MECHANICS CORPORATION and Others, Defendants, Impleaded with EDWARD J. WELCH, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs, and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LOUIS E. HERZ, as Stockholder of the AUTOMOBILE MECHANICS CORPORATION, Suing for Himself and Others Similarly Situated, Respondent, v. AUTOMOBILE MECHANICS CORPORATION and Others, Defendants, Impleaded with EDWARD H. GABOIN, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE BRONX GAS AND ELECTRIC COMPANY, Respondent, v. THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FIRST DISTRICT, and Others, Appellants, Impleaded with ADOLPH C. ANDERSEN and Others, Defendants.— Order modified by requiring plaintiff to give appropriate

receipts to consumers, and as so modified affirmed, with ten dollars costs and disbursements to respondent. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE GORDON'S DRY GIN COMPANY LTD., Appellant, v. GLICKSTEIN, WILKENFELD & TURNER, INC., Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

HENRY A. SOLELLIAC, Respondent, v. PENNSYLVANIA TEXTILE COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MAMIE CONTI, Respondent, v. MAX COHEN, INC., Appellant.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, on the authority of *Funger v. Brooklyn Bottle Stopper Co.* (132 App. Div. 837). Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

PATRICK H. ROOKE, Respondent, v. EDGAR S. APPELBY, Defendant, Impleaded with Q. R. S. COMPANY and Others, Appellants.— Orders affirmed, with ten dollars costs and disbursements; the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

PATRICK H. ROOKE, Respondent, v. EDGAR S. APPELBY, Appellant, Impleaded with Q. R. S. COMPANY and Others, Defendants.— Order affirmed, with ten dollars costs and disbursements; the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ROBERT BERNHARD, Appellant, v. HARRY COHEN and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

PHILIP REINGOLD and SAMUEL F. NEWMARK, Copartners Doing Business under the Firm Name and Style of THE REINGOLD HOSIERY Co., Respondents, v. FIDELITY KNITTING MILLS, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

PERFECTION TIRE & RUBBER COMPANY, INC., Respondent, v. PERFECTION TIRE AND RUBBER COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell, and Greenbaum, JJ.

IRVING H. HERRMANN and Another, Copartners Trading under the Firm Name and Style of HERRMANN & ROSENTEUR, Appellants, v. BURLINGTON TEXTILE COMPANY, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion to set aside service denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

JAMES MILLER, Respondent, v. C. AMORY STEVENS, Appellant.— Order

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affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

FLORENCE L. RISK, Appellant, v. JAMES RISK, Respondent.— Order affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

LENA RIZZO, Respondent, v. SALVATORE RIZZO, Appellant.— Order affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

LESLIE C. HARRIS, Respondent, v. HARRY L. MANDEVILLE, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

SUSQUEHANNA SILK MILLS, Appellant, v. SEYMOUR ABRAMS, Doing Business as STANDARD COSTUME COMPANY, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

SIMON ROSENBERG and Another, Copartners Doing Business under the Firm Name and Style of ROSENBERG & ADLER, Appellants, v. HARRY A. SCHOENEN and Another, Copartners Doing Business under the Firm Name and Style of H. A. SCHOENEN & SON, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THOMAS W. SIMMONS & COMPANY, INC., Respondent, v. J. E. DOCKENDORFF & Co., INC., Appellant.— Order affirmed, with ten dollars costs and disbursements; the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

BIRD S. COLER, Commissioner of Public Charities of the City of New York on Complaint of LENA BECKMAN, Respondent, v. HARRY WOSTEIN, Correct Name HARRY WERSTEIN, Appellant.— Order affirmed. No opinion. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of ALFRED A. MALCOMSON, Deceased.— Motion to dismiss appeal denied, without costs, without prejudice to renewal after decision of pending motion in the Surrogate's Court. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

FREDERICK W. GNICHTEL, as Receiver, v. IRVING D. STONE.— Motion to dismiss appeal denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, v. JOHN HILL.— Motion to dismiss appeal granted. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

HARRY TREAT BEERS v. HENRY B. PLANT and Others, as Executors, etc.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant complies with terms of order. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

FLORENCE J. MATTLE v. MARY COHN, Impleaded, etc.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

RURAL PUBLISHING CO., INC., v. ADOLPH S. KATZMAN.—Application granted. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

WILLIAM A. HOELAND v. CHARLES A. LANGE, Impleaded, etc.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

STANLEY WOLFSON v. BROOKLYN TRUST COMPANY, as Executor, etc.—Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

MORRIS MEYERS v. PETER C. BRYCE and Others, as Executors, etc.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of HUGH P. OROCKE and Others (OLD KINGSBRIDGE ROAD).—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ABRAHAM GLANZER and Others v. LEVI SHEPARD and Others.—Motion granted. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

NATIONAL IMPORTING AND TRADING COMPANY v. DAVID C. LINK and Others.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

FAULTLESS FUR MANUFACTURING CO., INC., v. 159 WEST 25TH STREET CO., INC.—Motion for leave to appeal denied, with ten dollars costs; motion for stay granted. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

PIERSON & CO. v. AMERICAN STEEL EXPORT COMPANY.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

ROBERT J. MACHER v. ISRAEL GRUBER.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of MARY A. EARLY, Deceased.—Motion denied, with ten dollars costs. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

WILLIAM A. BRADY v. ABRAHAM L. ERLANGER.—Motion to amend order of reversal granted on payment of ten dollars costs to defendant and the necessary printing disbursements caused by the change. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

KATE ISRAEL v. DAVID ISRAEL.—Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

CAROLINE M. ROBINSON v. HUBERT E. ROGERS and Others.—Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of JAMES T. LEONARD & CO., INC. (JOHN J. SULLIVAN).—Motion for stay pending appeal granted upon appellant's giving an undertaking, to be approved by the justice sitting at Special Term, Part II, to

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secure payment of the amount ordered to be paid in case of affirmance, within five days; in case undertaking not given within said period, motion denied. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

BARBARA SCHNATZ v. GEORGE J. SCHNATZ and Others.— Motion for stay granted upon defendants giving \$2,000 additional security. Settle order on notice. Present,— Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

THE CITY OF NEW YORK v. CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY.— Motion granted and time extended to and including April 15, 1921. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of CHARLES J. STEINBERG, an Attorney.— Motion denied. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

In the Matter of MARSHALL N. TRAYER, an Attorney.— Reference ordered to Hon. Henry A. Gildersleeve, official referee. Settle order on notice. Present — Clarke, P. J., Laughlin, Dowling, Merrell and Greenbaum, JJ.

JACOB FRIEDMAN, Respondent, v. HARRY B. DAVIS, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

BENNO FRIEDMAN, Respondent, v. HARRY B. DAVIS, Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw the demurrer and to answer on payment of said costs and ten dollars costs at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

WILLY POGANY, Respondent, v. CHARLES FROHMAN, INC., and Another, Defendants, Impleaded with DAVID BELASCO, Appellant.— Order so far as appealed from affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

In the Matter of the Submission to Arbitration between MAX GOLDMUNTZ and Others, Individually and as Copartners, Doing Business under the Firm Name and Style of GOLDMUNTZ BROS., Respondents, v. ABRAHAM SUDEROV, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

IDA RUBELMAN, Respondent, v. ALTER RUBELMAN, Appellant.— Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

EMMA GUMBEL, Respondent, v. B. ALTMAN & Co., Appellant.— Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ROSA JOSEPH, Appellant, v. INSURANCE COMPANY OF NORTH AMERICA, Respondent.—Judgment and orders affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ROSA JOSEPH, Appellant, v. GLOBE AND RUTGERS FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK, INC., Respondent.—Judgment and orders affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

MORRIS STANGER, Respondent, v. SAMUEL BERNSTEIN, Doing Business under the Firm Name and Style of S. BERNSTEIN & Co., Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

CHIPMAN, LTD., Respondent, v. ANGLO-SAXON TRADING CORPORATION, Appellant.—Order affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of said costs and ten dollars costs at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

CLARENCE E. BLOCK, Respondent, v. JOHN W. BLOCK, JR., Appellant.—Order affirmed, with ten dollars costs and disbursements, with leave to defendant to serve amended answer on payment of said costs and the costs awarded to plaintiff by the order appealed from. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

MAISON AGNES, Respondent, v. EMILIE KITTEL DESTINN, Appellant.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

BUSH, BEACH & GENT, INC., Respondent, v. "CHARLES" A. GUSTAFSON and Another, Individually and as Copartners Transacting Business under the Firm Name and Style of ANDERSON & GUSTAFSON, Appellants.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ESTELLE BROCKMAN, Appellant, v. GUSTAVE BEYER, Respondent.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, on the ground that there was an issue of fact for the jury upon the question of defendant's maintenance of a nuisance and because the verdict was inadequate. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.; Dowling, J., dissenting.

WILLIAM LUDDECKE, Appellant, v. GRASSELLI CHEMICAL Co., Respondent.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

AUGUSTA KIESEL, Respondent, v. MORRIS KRAUS and Another, Copartners, Doing Business under the Name and Style of KIAMESHA HOUSE, Appellants.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

NAT ABRAMS, Respondent, v. GUS L. ROSENBERG, Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HAGOP KEVORKIAN, Respondent, v. THE MANHATTAN STORAGE AND WAREHOUSE COMPANY, Appellant.—Judgment and order affirmed, with

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costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JASPER JOSEPH MAGGIO, Appellant.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM CALLETTI and SAMUEL LEVY, Appellants.— Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

WILLIAM BISCHOFF, Respondent, v. TRANSATLANTIC TRUST COMPANY, Appellant.— Determination affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

LOUIS OSLON and Another, Copartners, Doing Business under the Firm Name and Style of OSLON PAINTING AND DECORATING COMPANY, Respondents, v. CHARLES MARK and Another, Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

FRIENDLICH & MALTER CO., INC., Respondent, v. LOUISA APPELL, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

AARON SCHWARTZBACH, Respondent, v. WESTCOTT EXPRESS COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.; Clarke, P. J., dissenting.

HENRY V. GOTTLIEB, Respondent, v. INTERBOROUGH RAPID TRANSIT COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

IDA WINGERS MEYER, Respondent, v. ARTHUR W. DRUBIN and Another, Individually and as Copartners Engaged in Business under the Firm Name and Style of DRUBIN BROS., Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ALFRED R. SCHMID, Appellant, v. HORACE C. DUVAL and Others, Doing Business under the Firm Name and Style of H. C. DUVAL & Co., Respondents.— Judgment reversed and new trial ordered, with costs to appellant to abide event, on the ground that there was a question of fact for the jury. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

ISAAC FRIEDMAN, Respondent, v. BERNARD BUXBAUM and Another, Appellants.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HELEN DE BOWER, Appellant, v. HERBERT F. DE BOWER, Respondent.— Order affirmed, with ten dollars costs and disbursements, with leave to plaintiff to serve amended complaint on payment of said costs and ten dollars costs of motion at Special Term. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

WILLIAM R. AMANN, Respondent, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Appellant.— Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HARRY SAMWICK, Respondent, v. BLINDERMAN AMUSEMENT CO., INC., and Another, Defendants, Impleaded with ELIAS MAYER and Others, Appellants.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

SARAH L. ROBERTSON, Appellant, v. JOSEPH ARCHIBALD ROBERTSON, Respondent.—Judgment affirmed. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

EMANUEL B. YADWIN and Another, Respondents, v. CONSOLIDATED TEA COMPANY, Appellant.—Judgment and order affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

KING, RICE & GANEY COMPANY, Respondent, v. THE CITY OF NEW YORK, Appellant.—Judgment affirmed, with costs. No opinion. Present — Clarke, P. J., Laughlin, Smith, Page and Merrell, JJ.

HARRISON S. GREEN, Appellant, v. AUBREY G. MAGUIRE and Another, Respondents, Impleaded with MASSACHUSETTS OIL REFINING COMPANY, INC., and Others, Defendants.—Order reversed, with ten dollars costs and disbursements, motion denied, with ten dollars costs, and order for examination modified by striking out the specifications numbered “(1)” and “(5)” and the order for the production of books, papers, original agreements and documents; the date for the examination to proceed to be fixed in the order. No opinion. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

A. & B. EXPORT AND IMPORT CORPORATION, Appellant, v. FRANCO-AMERICAN CHEMICAL COMPANY, INC., and Another, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LAND VALUE REFUNDING CO., INC., Respondent, v. M. G. BABCOCK CO., INC., Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM R. MONTGOMERY, Appellant, v. UNITED STATES FIDELITY AND GUARANTY COMPANY, Respondent.—Order affirmed, with ten dollars costs and disbursements; amended answer to be served in five days from service of order. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES KRISER, Respondent, v. JOHN C. RODGERS, JR., and Another, Defendants, Impleaded with MARTHA M. RODGERS, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

AARON MINTZ, Respondent, v. LOUISE CALLEN, Appellant.—Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WALTER W. IRWIN, Appellant, v. HARVEY H. HEVENOR, Respondent. Impleaded with ARLAND W. JOHNSON, Defendant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

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WALTER F. SYKES, Appellant, v. JOSEPH DEGNAN, Respondent.— Order modified as stated in order and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA and Another, as Trustees, Respondents, v. WALTER SCHRENKEISEN, Defendant, Impleaded with UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS LINK, Respondent, v. ANDREW E. KALBACH, as Receiver, etc., Appellant.— Order reversed, with ten dollars costs and disbursements, motion denied, with ten dollars costs, and judgment reinstated. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

Proceedings Supplementary to Execution under Judgment in an Action Wherein DiMENNA & DePAOLO, INC., Was Plaintiff (Judgment Creditor), Respondent, and JOHN A. SYLVESTER Was Defendant (Judgment Debtor), Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.; Smith, J., dissenting.

JOHN BOLAND JEREMIAH GIBBS, Respondent, v. AARON KREIZEL and Another, Composing the Firm of A. KREIZEL & SON, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ROSE EINSTEIN, Respondent, v. SAMUEL J. EINSTEIN, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

VIOLET GROSVENOR, Respondent, v. WILLIAM J. BEAULEY, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of Proceedings Supplementary to Execution: BENJAMIN HYDE, Judgment Creditor, Respondent, v. ALFRED R. GORMULLY, Judgment Debtor, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MARGARET HEIDELBERG, Respondent, v. JENNIE K. MURPHY, Appellant.— Order modified as stated in order and as so modified affirmed, without costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

AMERICO ADINOLFI, Respondent, v. GARFIELD NATIONAL BANK and Others, Defendants, Impleaded with JACOB VOLK HOUSEWRECKING COMPANY, INC., Appellant.— Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JULIUS J. RAUH, Respondent, v. JOHN J. WHITE, INC., and Another, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

KATHRYN L. POWERS, Appellant, v. RAY M. POWERS, Respondent.— Order affirmed. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ERNEST SMITH and Another, Doing Business under the Firm Name and Style of ERNEST SMITH & Co., Appellants, v. SENECA COPPER CORPORATION, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MULLER-FOX BROKERAGE Co., Respondent, v. ARTHUR E. WINTER and Another, Copartners Doing Business under the Firm Name and Style of WINTER, ROSS & Co., Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LEO FINKENBERG v. BELL G. LEVINSON and Others.— Motion to dismiss appeal denied, without prejudice to renewal as stated in order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CATHARINE M. LOBEL v. CHARLES LOBEL.— Motion to dismiss appeal granted, with ten dollars costs.— Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

PHILIP LEWIS and Others v. HOME INSURANCE Co.— Motion to dismiss appeal denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK v. ARTHUR GUARINO.— Motion to dismiss appeal granted. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ANGELINE M. V. AUFTERO v. TERMINAL AND TOWN TAXI CORPORATION.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LILLIAN M. LUCEY v. CALLAN BROTHERS, INC.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JEFFREY MANUFACTURING Co. v. CLIFFORD S. PEETS.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THE FIRST NATIONAL BANK OF EDGEWATER, N. J., v. JACOB STOLZENBERG.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JOHN WANAMAKER, INC., v. THE CITY OF NEW YORK, Impleaded, etc.— Motion to dismiss appeal granted, with ten dollars costs, unless appellant comply with terms of order. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MOODY ENGINEERING Co., INC., v. CATALANA DE GAS Y ELECTRICIDAD, S. A.— Motion to dismiss appeal granted, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JONAS WEISER v. EMMERMAN & BAUMGHEIL Co.— Application denied,

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with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ADOLPH BULOVA v. E. L. BARNETT, INC., Impleaded, etc.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES A. ROGERS v. ROBERT T. RASMUSSEN.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HERBERT A. KNOX v. JOHN C. RODGERS, JR., and Others.— Application denied, with ten dollars costs and stay vacated. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

PRIMROSE DRESS CO., INC., v. DREYFUSS COSTUME CORPORATION.— Application denied, with ten dollars costs, and stay vacated. Order signed.— Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ACHILLE STARACE & CO., INC., v. RAPOREL S. S. LINE, INC., and Others.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

GREEN RIVER DISTILLING COMPANY v. MASSACHUSETTS BONDING AND INSURANCE COMPANY.— Application granted. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HARRY E. DORSEN v. EUGENE A. SULLIVAN and Others.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES EDGAR v. WILLIAM H. HALPIN, as Treasurer, etc.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ARTHUR S. LEWIS v. FEDERAL EXPORT CORPORATION.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ROSE E. MEYERS v. HARRIS M. COHEN, Impleaded, etc.— Application granted. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WALTER S. ROSSBACH v. PENNSYLVANIA RAILROAD COMPANY.— Application denied, with ten dollars costs. Order signed. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

NEW YORK INCOME CORPORATION v. FRANK M. WELLS and Others.— Motion for reargument denied. Motion for leave to appeal to Court of Appeals granted; question certified. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

NEW YORK INCOME CORPORATION v. FRANK M. WELLS and Others.— Motion for reargument denied. Motion for leave to appeal to Court of Appeals granted; question certified. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MUNICIPAL MORTGAGE COMPANY v. DODGE PUBLISHING COMPANY, Impleaded, etc.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

THOMAS H. HALL and Others v. VICTOR E. MEYER.— Motion denied,

with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

DAVID ROBERTSON v. THE FEDERAL X-RAY Co., INC.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

MORTIMER B. FOSTER v. N. W. HALSEY & Co.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JOSEPH DROBNER, an Infant, etc., v. AUGUST L. PETERS.— Motion granted; question certified. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM J. EHRLICH and Others v. GUARANTY TRUST COMPANY OF NEW YORK.— Motion granted. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

WILLIAM H. DALY v. GEORGE W. WEBB.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

FILOMENA RICCARDI, as Administratrix, etc., v. HERMAN STURCKE, Impleaded, etc.— Motion for leave to appeal denied, with ten dollars costs. Motion for stay granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ALFRED C. GAUNT v. NEMOURS TRADING CORPORATION and Others.— Motion denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

HAROLD L. EDWARDS v. MATHILDA EDWARDS.— Motion for stay granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

LITTLEFIELD-SHEPPERD Co. v. JOHN C. DUNN.— Motion for stay pending appeal granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

JACOB ORANGE v. ROY C. BOWMAN and Others.— Motion for stay granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

FIRST NATIONAL BANK OF EDGEWATER, N. J., v. JACOB STOLZENBERG.— Motion for stay denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

CHARLES LANDAU v. HODDUP-EVANS Co., INC.— Motion for stay granted. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

ANTOINETTE MINELLA v. H. C. F. KOCH & Co., INC.— Motion for stay denied, with ten dollars costs. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of THOMAS F. O'SULLIVAN, an Attorney.— Reference ordered to Hon. Henry A. Gildersleeve, official referee. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

In the Matter of CHARLES P. SULLIVAN, an Attorney.— Reference ordered to Hon. Henry A. Gildersleeve, official referee. Settle order on notice. Present — Clarke, P. J., Dowling, Smith, Page and Greenbaum, JJ.

SECOND DEPARTMENT, FEBRUARY, 1921.

EDITH M. BAYLIES, Respondent, v. GUSTAVUS BAYLIES, Appellant.— Motion granted, without costs, on condition that appellant perfect the appeal, place the case on the calendar for the February term and be ready for argument when reached; otherwise, motion denied. Present — Rich, Putnam, Blackmar and Jaycox, JJ.; Jenks, P. J., taking no part in the decision.

THOMAS KENNEDY, Respondent, v. THOMAS F. GILLEN COMPANY, INC., Appellant.— Motion granted, without costs. Present — Jenks, P. J., Putnam, Blackmar, Kelly and Jaycox, JJ.

SARAH LEVY, as Administratrix, etc., of MORRIS F. LEVY, Deceased, Appellant, v. W. KINTZLING POST, Respondent.— Motion granted, with ten dollars costs, on the ground that appellant has not complied with rule 12 of this court, showing by facts that the appeal is a meritorious one. Present — Jenks, P. J., Putnam, Blackmar, Kelly and Jaycox, JJ.

WINIFRED V. LYNCH, Respondent, v. ALEXANDER H. FIGGE, Appellant.— Motion denied, without costs. Present — Jenks, P. J., Putnam, Blackmar, Kelly and Jaycox, JJ.

DONALD McKELLAR, Respondent, v. AMERICAN SYNTHETIC DYES, INC., Appellant.— Order signed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EMMA WARNKE, Relator, v. ELIZABETH WARNKE, Respondent.— Motion granted on condition that appellant perfect the appeal, place the case on the calendar for the February term and be ready for argument when reached; otherwise, motion denied. Present — Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ.

THOMAS J. SMITH, Appellant, v. CHARLES J. ODELL and Others, as Trustees, etc., and Others, Respondents.— Motion granted in so far as to direct that the order shall grant costs of the appeal and in the trial court to the plaintiff. The motion for an extra allowance is denied, without costs. Present — Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ.

TRANSCONTINENTAL ENGINEERING CORPORATION, Appellant, v. ROLAND R. CONKLIN, Respondent.— Motion for stay granted on condition that appellant perfect the appeal and be ready for argument on Friday, February 11, 1921. Present — Jenks, P. J., Putnam, Blackmar, Kelly and Jaycox, JJ.

THE VALLEY FARMS COMPANY OF YONKERS, Respondent, v. CITY OF YONKERS, Defendant, Impleaded with COUNTY OF WESTCHESTER, Appellant.— Motion granted, without costs, and order signed. Present — Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ.

FRANCIS E. KRUEGER and GEORGE E. WEIDNER, Copartners, etc., Respondents, v. THOMAS DENNY, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Present — Rich, Putnam, Blackmar, Kelly and Jaycox, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MORRIS STEIN and MORRIS RUSSAKOFF, Appellants.— Judgment of conviction by

the Court of Special Sessions and order affirmed. No opinion. Rich, Putnam, Blackmar, Kelly and Jaycox, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CITY OF NEW YORK, Appellant, on Complaint of MARY MORRIS, *v.* JOHN F. MORRIS, Respondent.—Order of June 30, 1920, modified by increasing the amount to be paid weekly to the sum of fourteen dollars, and as thus modified affirmed, without costs. Order denying motion to resettle order of June 30, 1920, affirmed, without costs. No opinion. Jenks, P. J., Rich, Putnam, Blackmar and Jaycox, JJ., concur.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* WOLF GILMAN, Appellant, *v.* JAMES W. TUOMEY, Clerk of the Seventh District Municipal Court of the City of New York, Borough of Brooklyn, Respondent.—Order affirmed, with ten dollars costs and disbursements. (See *People ex rel. Rayland Realty Co., Inc., v. Fagan*, 194 App. Div. 185.) Jenks, P. J., Mills, Rich and Jaycox, JJ., concur; Blackmar, J., dissents.

Decisions by the Presiding Justice on Application to Appeal from the Appellate Term.

BERNARD GRAY, an Infant, by HARRY B. GRAY, His Guardian ad Litem, Respondent, *v.* THE BROOKLYN CITY RAILROAD COMPANY, Appellant.—Application denied, without costs. (See *Handy v. Butler*, 183 App. Div. 359.)

ISIDORE KAYFETZ and HARRY BLICKSTEIN, Copartners, Respondents, *v.* LEON MARCUS, Appellant.—Application denied, without costs. (See *Handy v. Butler*, 183 App. Div. 359.)

MICHAEL C. O'BRIEN and ISRAEL MANDEL, Respondents, *v.* B. N. Y. REALTY COMPANY, Appellant.—Application denied, without costs. (See *Handy v. Butler*, 183 App. Div. 359.)

PEARL ROSENSTEIN, Appellant, *v.* NOAH CLARK, INC., Respondent.—Application denied, without costs. (See *Handy v. Butler*, 183 App. Div. 359.)

TERESA SULLIVAN, Agent, etc., Respondent, *v.* WILLIAM W. OPFERMANN, Appellant.—Application denied, without costs. (See *Handy v. Butler*, 183 App. Div. 359.)

THIRD DEPARTMENT, FEBRUARY, 1921.

MICHAEL J. CALLANAN and Another, Appellants, *v.* THE STATE OF NEW YORK, Respondent.

Court of Claims — jurisdiction.

Judgment affirmed, with costs. All concur, except Kiley, J., dissenting, with a memorandum in which Woodward, J., concurs.

KILEY, J. (dissenting): The Laws of 1918, chapter 607, section 1, provide that, notwithstanding section 264 of the Code of Civil Procedure, the Court of Claims is authorized to *hear, audit and determine* all claims arising during the performance of any public contract or contracts for the construction of public works to which the State or any department, or commission thereof, is a party, because of a change, during performance, and subsequent to the

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entering into said contract, by which statutory provisions were enacted, which caused the claimant damage, to an extent not reasonably to be anticipated when the contract was made. What other condition could have been contemplated at the time of the enactment of that statute, or prompting its enactment, unless it were instances, of which this is a fair illustration? It will be conceded that the statute referred to does not compel payment of such a claim under any and all circumstances, but it does provide and require the Court of Claims to hear such claim and determine its validity. (*Munro v. State of New York*, 223 N. Y. 208.) It does more than that, it formulates the rule that is to guide the court, and just what must be shown for such court to exercise the power conferred upon it under this statute, viz., was the claimant damaged by such statute, framed after his contract was made, "to an extent not reasonably to be anticipated when such contract or contracts were made?" Having had a hearing and having found, as the court did in this case, that by reason of such enactment* increased and additional liability was imposed upon the claimant, and that such additional liability damaged claimant a fixed sum, the statute is devoid of significance, if a judgment does not legally follow such finding as a matter of course. The Court of Claims cannot say yes, we find you were damaged by this statute, we find your claim fits the conditions which the statute was designed to relieve but we will not give you relief, because this statute might perchance have saved you from responsibility for negligence. Such weighing of probabilities by the Court of Claims is not provided for by said statute; it is outside of its province and none of its concern. It made its finding, sufficient for judgment, in fact concede it even on this argument; but claims the right to say the findings do not amount to anything. It is repudiated as a useless exercise of the power conferred by statute. I am not ready to vote for any such discretion in the Court of Claims. I favor reversal. Woodward, J., concurred.

Before STATE INDUSTRIAL COMMISSION, Respondent.

In the Matter of the Claim of WACLAW STRUZYCKI, Respondent, for Compensation under the Workmen's Compensation Law, v. R. W. SMITH CONTRACTING COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Appellants.

Workmen's Compensation Law — notice of injury — amendment of section 18 of statute.

Award affirmed. All concur, except Kiley, J., dissenting, with a memorandum.†

KILEY, J. (dissenting): The accident in this case occurred on the 7th day of May, 1918. At that time the claimant was required, by section 18

* See *Callanan v. State of New York* (113 Misc. Rep. 267); *Workmen's Compensation Law* (Consol. Laws, chap. 67; Laws of 1913, chap. 816), as re-enacted by Laws of 1914, chap. 41, as amd.—[REF.]

† See *Struzycki v. Smith Contracting Co.* (20 State Dept. Rep. 410).—[REF.]

of the Workmen's Compensation Law, to give written notice of the accident and injury to his employer within ten days. On May 13, 1918, and before claimant had given such written notice to his employer, section 18, *supra*, was amended, extending the time to give notice to thirty days, and permitting the Commission to excuse default of the written notice, where "notice for some sufficient reason could not have been given, or on the ground that the employer, or his or its agents in charge of the business in the place where the accident occurred or having immediate supervision of the employee to whom the accident happened, had knowledge of the accident, or on the ground that the employer has not been prejudiced thereby." It is conceded that the claimant did not, within ten days, give the notice he was required to give by the law as it stood on the day he received his injury. The question is here presented for the first time under this section of the Workmen's Compensation Law, whether this amendment to said section 18, *supra*, is retroactive as well as prospective. I am impressed with the importance of the decision to be reached on this question. It must be conceded that the amendment of May 13, 1918, repealed, so far as it superseded, the provisions of section 18, *supra*, as such were on the 7th day of May, 1918, when claimant was injured; in other words, it wiped out the provisions as to notice, time of giving thereof, and the effect of failure to give that notice in writing, as effectively as it would if it did not substitute any provision in the place thereof, and such is the effect here whether we call it a repeal or an amendment. If I am right in this observation, section 93 of the General Construction Law applies. It reads as follows: "The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal has not been effected." Section 110 of said General Construction Law provides that the chapter is applicable to every statute unless some other provision of the law indicates a different intention. I have always understood, that means since I have studied law, that a pre-existing right or liability, will not be affected by legislation, unless legislative intent to the contrary is obvious; if there is a doubt it is to be resolved in favor of holding the subsequent statute prospective only. Appellant claims it had a vested right at the time this accident occurred by which the claimant was injured, viz., to have a notice thereof in writing served upon it within ten days. That to deprive it of that right this amendment must be held to be retroactive. Can it be held retroactive without the intention to have it so regarded clearly expressed in the amendment? In *Matter of Miller* (110 N. Y. 216) it is held that an amendatory statute has no retroactive effect unless such a legislative intent is discoverable in the act. Same is held in *Quinlan v. Welch* (141 N. Y. 158, 165); *Walker v. Walker* (155 id. 77); *Kelly v. Mulcahy* (131 App. Div. 639); *Stevenson Brewing Co. v. Eastern Co.* (22 id. 523). In *Bailey v. Kincaid* (57 Hun, 516) a motion was made to dismiss an appeal; the right to appeal began May 6, 1890, under section 1341

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of the Code of Civil Procedure as it read on May 6, 1890. The appellant had sixty days in which to appeal from the judgment against him. On May 26, 1890, that section was amended and went into effect, cutting the time in which to take an appeal down to thirty days.* Appellant did not take his appeal within the thirty days but did within sixty days. The appeal was dismissed holding, in effect, he was bound by the law as it was when his right to appeal began. The repeal or amendment of a statute is governed by the same rule. (*People ex rel. New York Edison Co. v. Wilcox*, 151 App. Div. 832, 839.) In *Geneva & Waterloo R. Co. v. N. Y. C. & H. R. R. Co.* (163 N. Y. 228) it is said: "It is a general rule in the construction of statutes that they are not to be given any retroactive effect when the language employed is fairly capable of any other construction." The rule contended for by the appellants has been applied under another section of the Workmen's Compensation Law. (*Moran v. Rodgers & Hagerty, Inc.*, 180 App. Div. 821.) The amendment to section 18 of the Workmen's Compensation Law is found in chapter 634 of the Laws of 1918. It contains no saving clause, nor any reservations; it was to take effect immediately, and is governed by section 110 of the General Construction Law. If this amendment acted prospectively only, as stated by Judge Kellogg, then it would not reach back to a compensable injury which occurred before the date of the amendment. To accomplish that we will have to give it a retroactive effect. We will have to make this statute an exception to the general rule. The respondents refer us to no authority for such action. I find none; I am not ready to consent to disturb a rule, so long and so well established. I, therefore, dissent and favor a reversal of the award and a dismissal of the claim.

J. H. STOCKAMORE LEATHER COMPANY, Respondent, v. DUANE SHOE COMPANY, Appellant.

Conversion — goods rejected by buyer — failure to return to seller constitutes conversion.

Appeal by defendant, Duane Shoe Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Fulton on the 24th day of March, 1920, and also from an order entered in said clerk's office on the 2d day of April, 1920, denying defendant's motion for a new trial made upon the minutes.

Judgment and orders unanimously affirmed, with costs, on the opinion of Mr. Justice Whitmyer at the Trial Term.

The following is the opinion of the court below:

WHITMYER, J. The action has been brought to recover damages for the conversion of a quantity of leather. In the spring of 1919, as the result of correspondence, plaintiff shipped 7,688 1/12 feet of leather to defendant as follows: May 15, 1919, sample dozen, containing 62 feet; May 26, 1919,

* See Laws of 1877, chap. 416, § 1, subd. 263; Laws of 1890, chap. 450.—
[REp.]

fifty-one and one-twelfth dozen, containing 3,061 $1\frac{1}{12}$ feet; and June 12, 1919, seventy-seven and seven-twelfths dozen, containing 4,565 feet. The price was to be forty-five cents per foot, making a total of \$3,459.71. The invoices described it as "black mat" and plaintiff's secretary says that it was. Defendant claims that it ordered "black mat kid," but that it received "black mat cabaretta," which is a cross between a goatskin and the skin of some other animal, and that it declined for that reason to accept and offered to return, upon payment of express charges laid out and upon receipt of shipping directions. At first, plaintiff refused, but finally sent check for the charges and directed defendant to return it. Then defendant answered that it could not comply, because it had cut into the leather. It did not comply and the action followed. A brief review of some of the correspondence will illuminate the situation. On June 9, 1919, when the shipment of fifty-one and one-twelfth dozen had arrived, defendant wrote and asked whether it was "mat kid or a cabaretta." On June 11, 1919, plaintiff replied that it was "mat cabaretta." On June 12, 1919, defendant wrote plaintiff not to ship any more cabarettas, because it had not purchased and could not use any, and that it would state its intention concerning the stock in a few days. On June 14, 1919, plaintiff wrote that the last order for "black mat cabarettas" had been shipped on receipt of the last letter, apparently referring to the letter of June twelfth. On June 19, 1919, defendant wrote and acknowledged receipt of the shipment, but stated that it was compelled to return same, because cabarettas had not been purchased, and asked for check for \$10.40 express charges on that shipment and \$8.40 express charges on the other shipment, with shipping directions; stated that, for plaintiff's convenience, it had repacked the bundles, in order to make them acceptable by the express company, but that it would go to the expense and ship the goods by freight in wooden cases if that would help out any, and stated that it had been making efforts to dispose of the leather for plaintiff and had received an offer of thirty-five cents per foot, and it asked plaintiff to answer by return mail, if interested. The letter stated, further, that the sample dozen had been charged twice and asked plaintiff to correct its books. On June 24, 1919, plaintiff wrote that it could not understand the tone of that letter, because the purchases had been made from the samples sent, and that, under the circumstances, it could not take the goods back and would expect remittance when bill became due. On that same day defendant wrote that it had stated its position and asked whether it should return the goods or whether plaintiff would accept the offer of thirty-five cents per foot. On June 26, 1919, defendant telegraphed that it had received plaintiff's letter of the twenty-fourth and would return the goods by express that day, unless plaintiff accepted the offer of thirty-five cents, stating that "mat kid" had been sold and "cabaretta" had been shipped. And, on the same day, it wrote to the same effect, inclosing a copy of the telegram, except that the letter stated that the goods would go back C. O. D., express charges laid out, unless plaintiff telegraphed acceptance of the thirty-five-cent offer by June twenty-seventh, the next day. On July 8, 1919, plaintiff sent bill for \$3,459.74.

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On July 17, 1919, defendant acknowledged receipt and said that it owed plaintiff nothing, but that plaintiff owed it "\$18.40" for express and that the leather would be forwarded upon receipt of amount. On July 21, 1919, plaintiff sent its check for \$18.80, asked for the express receipts, and wrote, "in regard to the two shipments of black mat shoe leather, you may return them by express at once, if they are in original dozens and the same condition as when we shipped them." Defendant admits that it received the letter, but claims that it did not receive the check. On July 30, 1919, plaintiff telegraphed for answer why leather had not been returned. On that day and, it claims, before receipt of telegram, defendant wrote that it had cut into some of the leather, because it had received no reply from plaintiff in over a month, and asked for duplicate bill for shipment of June twelfth, claiming that it could not find same and for corrected bill for sample, since it had been charged for same on May fifteenth and again on May twenty-sixth, so that it might clear the account. On August 2, 1919, defendant replied to the telegram and called attention to its last letter. And it requested plaintiff to adjust the matter satisfactorily, saying that check would go forward at once. On August 6, 1919, plaintiff served a written demand, but defendant has not paid for or returned the leather, nor has it returned the check. The question of damages was sent to the jury and the finding was for fifty-five cents per foot or for the total of \$4,228.55. By the motions and the stipulation made, the question whether or not there was a conversion remains. In all communications with plaintiff, from June nineteenth to and including July seventeenth, defendant stated that it would not accept and offered to return the leather upon receipt of express charges laid out. In several, it presented an offer for a lesser price. On July twenty-first plaintiff sent its check for the express charges, as requested, and inclosed same with a letter, in which it directed defendant to return both shipments at once, by express, if in original dozens and in the same condition as when shipped. Defendant received the letter and must have received the check. It then became its duty to comply with the directions. And the provision as to the form and as to the condition did not relieve it, because the former related to the statement in defendant's letter of June nineteenth, in which it wrote that it had repacked the bundles, for plaintiff's convenience, and the latter was only what the law implied. As late as July seventeenth, defendant had written that the leather would go forward, upon receipt of express charges, thus implying that it was intact and plaintiff was merely accepting its statements as true. The fact is that defendant had taken both shipments out of the original packages and had assorted same as to weight, sizes, quality and grades, as soon as they were received, and at some time, not exactly fixed, had cut into and used a substantial amount from each shipment. Its acts constituted a conversion. (*San Lucas v. Bornn & Co.*, 173 App. Div. 703, 708; *affd.*, 225 N. Y. 717; *Industrial & General Trust v. Tod*, 170 *id.* 233; *Field v. Sibley*, 74 App. Div. 81.) The leather was not returned and plaintiff, on July thirtieth, telegraphed for the reason. And on that day, but before receipt of telegram, it claims defendant wrote that it could not comply, because it had cut

into same, having received no reply in over a month, and asked for corrected bill for sample and duplicate bill for shipment of June twelfth, claimed to have been lost, so that it might clear the account. But it had received plaintiff's bill, sent July eighth, for the amount of the claim, and had also received the letter of July twenty-first at that time. And the transaction was off and had been for nine days. Therefore, - plaintiff is entitled to judgment.

AMERICAN LA FRANCE FIRE ENGINE COMPANY, Inc., Respondent, v. SAVAGE ARMS CORPORATION, Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements.

ETTA H. EDMONDS, Respondent, v. ALFRED McDERMOTT, Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements. Van Kirk, J., not sitting.

CHARLES F. ECKERT, JR., Appellant, v. ALICE M. PRESLER, as Sole Administratrix, etc., of MERENUS A. PRESLER, Deceased, Respondent.— Judgment unanimously affirmed, with costs.

IDA GOLDBERG and MAC FISCH, Respondents, v. SOLOMON LEVINE, Appellant.— Order reversed, with ten dollar costs and disbursements, and motion granted, with ten dollars costs, upon the authority of *Behrens v. Sturges* (121 App. Div. 746); *Beman v. Todd* (124 N. Y. 114); *Burkhardt v. Sanford* (7 How. Pr. 329, 334). All concur.

ELMER E. KNIGHT, Respondent, v. SHERMAN BROWN and HATTIE BROWN, Appellants.— Judgment affirmed, with costs, upon the former decision of this court (162 App. Div. 438). All concur.

FRED LACEY, Respondent, v. WALKER D. HINES, Director-General of Railroads, Successor in Office of WILLIAM G. McADOO, Director-General of Railroads. THE LEHIGH VALLEY RAILROAD COMPANY, Appellant.— Judgment and order unanimously affirmed, with costs.

In the Matter of the Application and Petition of JOHN F. GALVIN and Others, Constituting the Board of Water Supply of the City of New York, to Acquire Real Estate for and on Behalf of the City of New York under Chapter 724 of the Laws of 1905 and the Acts Amendatory Thereof, in the Towns of Shandaken, County of Ulster; Lexington and Prattsville, County of Greene; Roxbury, County of Delaware, and Gilboa and Conesville, County of Schoharie, State of New York, for the Purpose of Providing an Additional Supply of Pure and Wholesome Water for the Use of the City of New York, Respondent. TRI-COUNTY LIGHT AND POWER COMPANY, Appellant.— Order unanimously affirmed, with ten dollars costs and disbursements.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of WILLIAM SHAMBEAU for Compensation under the Workmen's Compensation Law, Respondent, v. ROBESON PROCESS COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier. Appellants.— Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of FRED SCHANZENBACH, for Compensation under the Workmen's

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Compensation Law, Respondent, v. WALDORF-ASTORIA HOTEL COMPANY, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ANNA RAUTH, as Widow, for Herself and Minor Children for the Death of JOHN RAUTH, for Compensation under the Workmen's Compensation Law, Respondent, v. CHARLES SCHAEFER & SON, Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award reversed and claim dismissed on the ground that there is no proof that the accidental injury created a weakened condition, or that a weakened condition thus occasioned existed when the disease of pneumonia was contracted, or that there existed any causal relation between the accidental injury and the death. All concur, except John M. Kellogg, P. J., dissenting.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of LESLIE A. WOODCOCK, Appellant, for Compensation under the Workmen's Compensation Law, v. THE TEMPLE BROTHERS, Employer, and THE FIDELITY AND CASUALTY INSURANCE COMPANY, Insurance Carrier, Respondents.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MARY PASSINA, Respondent, for Compensation on Behalf of Herself and Minor Children under the Workmen's Compensation Law, v. J. J. ARCHBOLD FORWARDERS, INC., Employer, and GLOBE INDEMNITY COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MICHAEL BRADY, for Compensation under the Workmen's Compensation Law, Respondent, v. ATLANTIC BASIN IRON WORKS, INC., Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of MRS. DELLA WESSING, Widow of LAWRENCE WESSING, Deceased, for Compensation under the Workmen's Compensation Law, Respondent, v. ONEITA KNITTING MILLS, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Appellants.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of CHARLES VAN SCHOICK, for Compensation under the Workmen's Compensation Law, Respondent, v. THE FELTERS CO., INC., Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.—Award affirmed. All concur, except Kiley, J., dissenting on authority of *Kade v. Greenhut Co., Inc.* (193 App. Div. 862).

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim for Compensation under the Workmen's Compensation Law Made by WILLIAM MAHONEY, Respondent, v. BLACK & WHITE & TOWN TAXIS, INC., Employer and Self-Insurer, Appellant.—Award unanimously affirmed.

Before STATE INDUSTRIAL COMMISSION, Respondent. In the Matter of the Claim of ISAAC J. PETERSON for Compensation under the Workmen's

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NEW YORK FRUIT MARKET, a Copartnership Composed of CLEON ALEXANDER and Others, Appellant, v. ATLANTIC FRUIT COMPANY and Others, Respondents.— Judgments affirmed, with costs. All concur, except Woodward and Kiley, JJ., dissenting.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ADDISON J. CRONK, Respondent, v. MARGARET MAXIM, Appellant.— Order unanimously affirmed, without costs.

THOMAS W. PARKHILL and MARY PARKHILL, Respondents, v. GLOBE SILO COMPANY, Appellant.— Judgment unanimously affirmed, with costs.

FLORENCE ROLFE, as Administratrix, etc., of EDMUND ROLFE, Deceased, Plaintiff, v. JOSEPH F. HEWITT, Defendant.— Plaintiff's exceptions sustained, and new trial granted, with costs to plaintiff to abide event, upon the ground that the evidence now appearing presents a question of fact for the jury. All concur, except Woodward, J., dissenting.

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4. Legislature has power to enact Workmen's Compensation Law, to take away statutory remedy for death claim and substitute another therefor. *Culhane v. Economical Garage, Inc.*, 103.

5. Provision of Workmen's Compensation Law, relative to payment of death benefit of \$900 where there are no dependents is valid. *Watkinson v. Hotel Pennsylvania*, 624.

[For tables of the sections of the United States and New York Constitutions cited and construed in this volume, see *ante*, pp. lxvi and lxvii.]

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1. Violation of injunction restraining defendant from engaging in business — plaintiff must show actual damages — extent of penalty or fine when actual damages not shown — covenant for liquidated damages preceding covenant not to engage in business does not control. *Grand Art Flower Co., Inc., v. Markovits*, 387.

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2. Witness not guilty of contempt by refusing to testify before referee where order of reference was granted and refusal to testify took place before complaint was verified and summons served. *Finkenberg, Inc., v. Crompton Building Corporation*, 20.

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1. Purchases of cotton future contracts do not become unlawful by being closed out by sale of broker, by direction of customer, before time of delivery under contract. *Scandinavian Import-Export Co., Inc., v. Bachman*, 297.

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2. In action on promissory note setting up as defense agreement by plaintiff to execute release to defendant, parol evidence not admissible to explain meaning of "as individual" in agreement. *Gold v. Ross*, 721.
3. Where letter actually on its face purports to be written agreement but is only supplementary to an oral contract, parol evidence is admissible to determine what contract was. *Melzer v. Coe-Stapley Manufacturing Corporation*, 664.

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4. Action by stockbroker to recover balance due on marginal account — error to charge jury that verdict for defendant might be rendered not on theory that second order was purchased but that plaintiff would have purchased before such time and at price which would have left credit balance in favor of defendant — right of broker where customer repudiated order to sell stock short — failure of purchasers to give directions, brokers were within right in purchasing stock at market, at time and place specified, to cover short sales. *Neuburger v. Levinson*, 502.

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5. Action for breach of factor's agreement — substantial damages not shown by unestablished affirmative allegation that plaintiff diligently, but unsuccessfully, endeavored to secure another factor, and that it was compelled to discontinue business — measure of damages where another factor is procured to complete contract — burden of proof is on plaintiff to show substantial damages. *Allied Silk Manufacturers, Inc., v. Erstein*, 366.
6. Amount stipulated in agreement not to engage in business is not liquidated damages where covenant as to liquidated damages preceded covenant not to engage in business — error for court to impose fine for contempt in violating injunction in amount stipulated in contract instead of under section 773 of Judiciary Law. *Grand Art Flower Co., Inc., v. Markovits*, 387.
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1. Stock — in action for alleged conversion of stock, the question whether defendants agreed to carry said stock or whether sale was for cash, evidence sufficient to show that defendants did not convert stock by sale. *Jacobs v. Moore*, 452.
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2. Domestic corporation is deemed to have residence in county where principal place of business is located. *Cervel Court Realty Co., Inc., v. Jonas*, 662.

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3. Declaration of dividends of corporations is within discretion of directors and their action with reference thereto, in the absence of bad faith, will not be disturbed by a court of equity — complaint insufficient which does not show that directors recognized propriety of declaring dividends, nor duty so to do, but merely charges general bad faith — allegations as to collusion insufficient to warrant relief. *Nauss v. Nauss Brothers Co.*, No. 1, 318.

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4. Inspection of books — equity will not interfere on theory that it is necessary to maintain *status quo* pending mandamus proceedings instituted for purpose of inspection of books. *Nauss v. Nauss Brothers Co.*, No. 1, 318.

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5. Executory contract of employment — power of majority of directors, acting separately and not collectively, does not extend to bind corporation — acts of all directors who own all stock bind corporation though they act separately and not collectively — measure of damages for breach of executory contract compensable only and claim for money expended by plaintiffs cannot properly be included. *Gerard v. Empire Square Realty Co.*, 244.

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6. Corporation may not repudiate agreement to deal in cotton futures and recover back moneys deposited as margins on ground of *ultra vires* acts where it is authorized to buy and sell all kinds of personal property — corporation's agreement for purchase of cotton futures with brokers not unlawful — allegations of complaint that defendants executed orders given by plaintiff for purchase and sale of cotton future contracts preclude recovery by plaintiffs in disregard of transactions had by defendants for its account, of money it deposited with defendants. *Scandinavian Import-Export Co., Inc., v. Bachman*, 297.

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7. Defense of *ultra vires* with respect to trading corporations is not favored. *Scandinavian Import-Export Co., Inc., v. Bachman*, 297.

8. Action in equity by stockholder against corporation and executrix of stockholder to compel distribution of dividends and for other relief, on appeal from an order of the executrix denying her motion on pleadings, question presented for decision is whether complaint sufficiently states cause of action for any equitable relief demanded, and whether she, in her representative capacity, is proper party. *Nauss v. Nauss Brothers Co.*, No. 1, 318.

9. Executrix of stockholder neither necessary nor proper party in equitable action to compel defendant to declare and distribute dividends. *Nauss v. Nauss Brothers Co.*, No. 1, 318.

10. Service of summons on corporation will not be set aside on ground that it was not made on managing agent, authorized to receive service, where facts show exercise of powers of managing agent by person who alone is in apparent charge and control. *Municipal Mortgage Co. v. 461 8th Ave Co., Inc.*, 370.

11. Organization of United States Shipping Board — Congress having provided for incorporation of defendant and authorized Shipping Board

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for and on behalf of United States to subscribe not less than one-half capital stock, authorized creation of artificial person and laid aside its sovereign character taking on that of private citizen, stockholder in corporation — such corporation became liable for debts and satisfaction of such debts is to be obtained out of its property and not as claim against United States — New York courts have jurisdiction over transactions within State. *Ingersoll-Rand Co. v. United States Shipping Board Emergency Fleet Corporation*, 838.

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16. Stockholder's liability for costs in action for accounting — where a stockholder has asked for an accounting and receivership and by stipulation between parties action is discontinued, without costs, stockholder is liable for services and expenses of receivers. *McHarg v. Commonwealth Finance Corporation*, 862.

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2. Wife not entitled to counsel fees in action for separation where she fails to present to court reasonable ground for commencing action and that there is reasonable probability that she will succeed. *Domb v. Domb*, 526.

3. Against executors — costs properly taxed where right to maintain action is based upon matters foreign to administration of estate. *Maxwell v. Thompson*, 616.

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2. Criminal anarchy — conviction of person for publication of manifesto in aid of Communist struggle — Penal Law sections 160-166, relating to criminal anarchy, are not unconstitutional — Legislature has power to make it a crime to advocate within State overthrow of United States Government or of government of another State — such provisions not legislation interfering with free speech — common-law theory of causal connection between acts prohibited and dangers apprehended is not applicable to criminal anarchy — words "by unlawful means" as used in Penal Law, sections 160, 161, construed — criminal anarchy is made crime without criminal intent — evasion of statute by using existing government is no defense — evidence by member of bar of foreign city is admissible to show nature of mass strike — evidence as to circumstances under which articles forming basis of prosecution were prepared is admissible — persistence in offering evidence formerly rejected did not prejudice defendant — argument of district attorney not prejudicial — preclusion of defendant from making statements of facts not in evidence was not prejudicial — charge of court not prejudicial — acts warranting finding person guilty of conspiracy in violation of sections 580-582 of Penal Law. *People v. Gillow*, 773.

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4. Robbery — reversible error in prosecution for robbery to admit evidence of police officers and complaining witness that latter pointed out defendants as perpetrators from among number of men lined up. *People v. Ragazinsky*, 743.

[For tables containing all sections of the Penal Code and Penal Law and of the United States and State Criminal Codes cited and construed in this volume, see *ante*, pp. lxxvii and lxxviii.]

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1. Question whether instrument was duly executed by persons by making their marks is for the jury and certificate of acknowledgment is *prima facie* proof only. *Rock v. Rock*, 59.

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1. "Sale of Cable Transfer of Exchange." *Equitable Trust Co. v. Keene*, 384.

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2. Where plaintiff sues on agreement and answer alleges that terms are not fully nor correctly set out, and that terms were changed, without stating the change, leaving facts covert, does not constitute good denial — under such circumstances plaintiff may have examination before trial. *Simon v. Waldinger & Glaser, Inc.*, 908.

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1. Distribution of personal property of married woman dying intestate leaving husband and no descendants is controlled by common law and estate vests in husband without administration. *Conlon v. Union Dime Savings Bank*, 509.

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2. Summary proceedings cannot be maintained against tenant for failure to obey order of fire department, though lease contains covenant for forfeiture for failure so to do — such proceedings cannot be maintained under section 94 of the Labor Law where lease did not obligate compliance with Labor Law but only with orders of municipal and other lawful authorities — ejectment proper remedy. *Davis Brothers Realty Corporation, Inc., v. Harts*, 403.

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5. The purpose of section 829 of the Code of Civil Procedure is to protect estate in the hands of the executors or administrators and to prevent persons interested in the event of an action or special proceeding from testifying to conversations with the deceased. *Matter of Gratton*, 32.

6. Parol evidence cannot be received to impeach official certification of bill by presiding official, or journals of respective houses. *People ex rel. Durham Realty Corporation v. La Fetra*, 280.

7. Where letter actually on its face purporting to be written agreement but is only supplementary to an oral contract, parol evidence is admissible to determine what contract was. *Metzger v. Coe-Stapley Manufacturing Corporation*, 664.

8. In action on promissory note setting up as defense agreement by plaintiff to execute release to defendant, parol evidence not admissible to explain meaning of "as individual" in agreement — agreement to execute release, though not signed by defendant, was good defense to action on note — transactions respecting two speculative corporations and individual and corporate payments were intermingled and adjusted on sale of plaintiff's interest to third person and comprehended whole subject-matter. *Gold v. Ross*, 721.

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13. Evidence that furniture in possession of bailee and destroyed by fire was in first-class condition and that like furniture had increased in value from fifty per cent to seventy-five per cent was sufficient to warrant amount of verdict. *Siegel v. Spear & Co.*, 845.

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1. Husband who may obtain possession of his deceased wife's personality may do so without administration. *Conlon v. Union Dime Savings Bank, 509.*

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2. Where husband is appointed administrator of wife's estate and gains possession of her money which he deposits in his own name as administrator, deposit should be paid to his administrator on his death rather than to administrator *de bonis non* of wife, form of deposit not changing fact of exclusive ownership. *Conlon v. Union Dime Savings Bank, 509.*

3. Possession of testator's property — executor is properly granted leave under Code of Civil Procedure, section 2701, to enter into possession of testator's real property and control and manage same where legacies to be paid amount to \$35,000 and total personal and real property do not exceed \$40,000, with indebtedness of \$2,000, and non-resident residuary devisee has divested herself of all her interest and interest and principal are due and payable on mortgage — such order does not deprive residuary devisee or her grantee of property without due process of law. *Matter of Mould, 822.*

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3. Suit to have statutes fixing gas rates declared unreasonable and confiscatory — court may order reference where long and complicated accounts must be examined. *Bronx Gas & Electric Co. v. Public Service Comm.*, First Dist., 554.

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2. Custody of children — on annulment of marriage in action by wife on ground that she was not of age of consent, court has power to award her custody and care of issue of marriage. *Nealon v. Nealon*, 694.

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6. Abandonment on part of husband not shown by evidence but rather refusal on part of wife unjustifiably to live with husband — decree in favor of wife denied. *Domb v. Domb*, 526.

7. Abandonment entitling spouse to decree of separation must be one contemplating voluntary separation of one from the other without justification. *Domb v. Domb*, 526.

8. Complaint alleging adultery by husband insufficient as allegation of cruel and inhuman treatment — causes of action for divorce and separation cannot be united — adultery accompanied by other acts and conduct may constitute cruel and inhuman treatment. *Hofmann v. Hofmann*, 596.

9. Alimony — wife not entitled to alimony *pendente lite* and counsel fees where she fails to present to court any evidence that there is reasonable ground for commencing action and that there is reasonable probability that she will succeed. *Domb v. Domb*, 526.

IMMATERIAL ALLEGATIONS.

See PLEADINGS, 24.

IMPUTED NEGLIGENCE.

See NEGLIGENCE, 5.

INCOME TAX.

See TAXATION, 12, 13.

INCOMPETENT PERSONS.

See INSANE PERSONS.

INFANTS.

See PARENT AND CHILD.

INJUNCTION.

See, also, CONTEMPT; GAS AND ELECTRICITY, 1; LANDLORD AND TENANT, 10; SUMMARY PROCEEDINGS, 4, 5.

PENDENTE LITE.

1. Injunction *pendente lite* properly granted in action against gas company to restrain enforcement of rates fixed by it independently of Public Service Commission after statutory rates had been adjudged confiscatory — issues may then be determined by trial and not on affidavits. *Morrell v. Brooklyn Borough Gas Co.*, 1.

RIGHTS PROTECTED.

2. Corporation engaged in masonry construction which has been compelled to abandon performance of contract because its president had been expelled from union and thereafter it was interfered with by contractors' association and union, is entitled to injunction and damages. *Brescia Const. Co. v. Stone Masons Contractors' Assn.*, 647.

JUDICIAL PROCEEDINGS.

3. State court has no right to enjoin proceedings in United States court where latter court has jurisdiction of parties and subject-matter of litigation — fact that plaintiff cannot set up all defenses or counter-claims does not warrant interference — multiplicity of actions does not furnish basis for relief. *Susquehanna S. S. Co., Inc. v. Andersen & Co., Inc.*, 161.

4. Summary proceedings in Municipal Court of City of New York will not be restrained where matters set up constitute defenses which may be set up in answer. *Huyler's v. Broadway-John Street Corp.*, 410.

INJUNCTION — Continued.**MODIFICATION.**

5. Injunction modified by limiting amount of stock to be held by defendants to \$18,000 — provision for vacation of injunction on showing of compliance. *Rogers v. Rasmussen*, 881.

INSANE PERSONS.**DETERMINATION OF QUESTION OF INSANITY.**

1. Commissioner appointed in proceedings *de lunatico inquirendo* may issue precept before taking oath — oath may be filed *nunc pro tunc* — taking of oath only ministerial act — proceedings probably not void if jury regularly called without precept — jury may be summoned, hearing had and oath filed in county of alleged incompetent's residence or where property affected situated, although petition may have been presented in another county. *Matter of Doyle*, 733.

EFFECT OF INSANITY.

2. Annulment of marriage — insanity is not ground for annulment of marriage by sane spouse. *Reed v. Reed*, 531.

INSTRUCTIONS.

See MASTER AND SERVANT, 2, 5, 6; PRINCIPAL AND AGENT, 11; TRIAL, 5.

INSURANCE.

See, also, BAILMENTS.

FIRE INSURANCE.

1. Coverage — policy on building and extension thereto occupied as store and dwelling does not cover another building on same lot not occupied. *Altman v. Home Insurance Co.*, 151.

2. Construction of policy — there is no ambiguity in insurance policy purporting to insure a dwelling because of the fact that another building not occupied was situated on the same lot. *Altman v. Home Ins. Co.*, 151.

3. Coinsurance — parties to fire policy are not prohibited by Laws of 1917, adding section 121, and standard fire policy thereby adopted, from agreeing that eighty per cent average or coinsurance clause may be added to standard policy. *Aldrich v. Great American Insurance Co.*, 174.

INTEREST.

See, also, BANKS AND BANKING, 2.

Interest is properly chargeable on a bank assessment against testator from time assessment made. *Maxwell v. Thompson*, 616.

ISSUES.

See TRIAL, 2.

JOINDER OF PARTIES.

See PARTIES, 2.

JOINT ADVENTURE.

See, also, ACCOUNTS AND ACCOUNTING, 2.

What constitutes — agreement of one person to contribute time and give benefit of experience in sale of goat skins and of another to purchase skins, with provision that net profits of transaction be divided between parties, constitutes joint adventure. *Franken-Karch Corporation v. Castriotis*, 529.

JUDGMENTS.

See, also, APPEAL, 15; DEBTOR AND CREDITOR; MORTGAGES; PLEADINGS, 23.

ENTRY.

1. Entry of judgment against defaulting joint debtor who was maker of note erroneous where action not severed — severance of action after judgment entered does not cure error and warrants vacation thereof on motion. *Kriser v. Rodgers*, 394.

JUDGMENTS — Continued.

FORMER JUDGMENT.

2. Judgment in prior suit for accounting between same parties is not *res judicata* in action for penalty prescribed by section 114 of the Banking Law for exaction of excess interest. *Teplitz v. Bloomingdale*, 15.

LIEN.

3. Deed of land executed and delivered after verdict against grantor but before judgment is valid and judgment does not become lien on land. *Boyle v. Blankenhorn*, 265.

JUDICIAL NOTICE.

See EVIDENCE, 2, 3.

JURISDICTION.

See COURTS, 1, 2; HABEAS CORPUS, 1; MUNICIPAL COURTS, 1; SHIPS AND SHIPPING; SURREGATE'S COURT; WORKMEN'S COMPENSATION LAW, 44, 45.

LABOR.

See LANDLORD AND TENANT, 9; MONOPOLIES AND COMBINATIONS.

LABOR LAW.

See, also, EJECTMENT, 2; LANDLORD AND TENANT, 9.

No liability attaches to owner of apartment house where he does not know that the Labor Law forbidding children to work in connection therewith is violated. *Woerz v. Rosenfeld*, 19.

LANDLORD AND TENANT.

See, also, INJUNCTION, 4; MUNICIPAL COURTS; SUMMARY PROCEEDINGS.

IN GENERAL.

1. Complaint in action to recover for services in procuring tenant, alleging that plaintiff produced tenant able, ready and willing to execute lease, good against demurrer. *Harrity v. Steers*, 11.

IMPROVEMENTS ON PREMISES.

2. Tenant is required to make changes ordered by fire department as condition to issuance of permit to manage garage where it covenanted and agreed in lease to comply with and execute lawful orders and regulations of board of health, police department and city corporation. *Frank v. Bowman Automobile Co.*, 377.

3. In action on bond to secure performance of covenant in lease to make alterations defendant is estopped to deny that plaintiff is not entitled to recover as if owner, although only lessee under original lease — measure of damages would be cost of alterations — recovery not limited to amount deposited as general security. *Kanter v. New Amsterdam Casualty Co.*, 756.

DUTIES AND LIABILITIES OF TENANT AS TO CARE OF PREMISES.

4. Defective sidewalk — action against owner of leased building for injuries sustained by falling on sidewalk in front of building — question of fact whether condition existed prior to lease — whether lease was fictitious was question for determination of jury. *Posner v. Cohn*, 373.

POSSESSORY REMEDIES.

5. Landlord and tenant may agree as to what may constitute a breach of covenants and a breach thereof is available to the landlord in summary proceedings instituted under section 2231 of Code of Civil Procedure — breach of covenant before plaintiff acquired property does not constitute defense to proceeding where effect thereof was not known until he was informed by board of fire underwriters — warrant of dispossession cannot be refused on ground that violations of the lease were not willful and that compensatory damages only ought to be awarded. *Matter of Balducci v. Rakov*, 52.

6. Notice — fact that landlord gave twenty-one days' notice does not vitiate the notice, even though only three days' notice was required. *Matter of Balducci v. Rakov*, 52.

LANDLORD AND TENANT — *Continued.*

7. Jurisdictional matters cannot first be raised on appeal. *Matter of Balducci v. Rakov*, 52.

8. Mandamus is appropriate proceeding to compel issuance of precept in summary proceedings. *People ex rel. Durham Realty Corporation v. La Petra*, 280.

9. Remedy of landlord for violation of Labor Law by tenant — summary proceedings cannot be maintained against tenant for failure to obey order of fire department respecting requirements of Labor Law, though lease contains covenant for forfeiture for failure so to do — such proceedings cannot be maintained under section 94 of the Labor Law where lease did not obligate compliance with Labor Law, but only with orders of municipal and other lawful authorities — ejectionment proper remedy. *Davis Brothers Realty Corporation, Inc., v. Harle*, 403.

10. Injunction granted to restrain summary proceedings pending suit for specific performance of an agreement to renew lease — adequate remedy could not be afforded plaintiff in summary proceedings in Municipal Court of City of New York — summary proceedings tried after denial of injunction — injunction order not issued on appeal — leave to apply for injunction if judgment in summary proceedings reversed. *Loughman v. Lilliendahl*, 867.

LEGACIES.

See WILLS, 2, 3.

LEGISLATURE.

Parol evidence cannot be received to impeach official certification of bill by presiding official, or journals of respective houses. *People ex rel. Durham Realty Corporation v. La Petra*, 280.

LIBEL.**PRIVILEGED COMMUNICATION.**

1. Letter by defendant to its customers stating reason for discharging plaintiff is qualifiedly privileged even though statement may be partially false — proof of actual malice necessary — complaint properly dismissed where alleged libel consisted of statement as to disloyalty and unfaithfulness of employee — "dishonest" as used in communication may mean unfaithfulness. *Browne v. Prudden-Winslow Co.*, 419.

PLEADINGS.

2. In action for libel, slander cannot be pleaded as counterclaim, defense, partial defense or in mitigation. *Udovichky v. Bacheff*, 860.

LIENS.

See, also, TRUSTS.

1. Mechanics' liens filed between date of contract of purchase and date for closing constitute incumbrance. *Roberts v. New York Life Ins. Co.*, 97.

2. Mechanic's lien — foreclosure — evidence insufficient to support judgment on theory of *quantum meruit* where complaint was framed on contract but plaintiff did not rely on contract on trial — plaintiff in equity case must bear same burden of proof as in any action. *Hurwitz v. Calvin Realty Corporation*, 416.

LIMITATION OF ACTIONS.

See CANALS; MUNICIPAL CORPORATIONS, 8.

LIQUIDATED DAMAGES.

See CONTRACTS, 6.

LUNATICS.

See INSANE PERSONS.

MANDAMUS.

See LANDLORD AND TENANT, 8.

MARITIME LAW.

See WORKMEN'S COMPENSATION LAW, 4.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See, also, DAMAGES, 2; PLEADINGS, 4, 22.

DURATION AND TERMINATION OF CONTRACT OF EMPLOYMENT.

1. Power of majority of directors, acting separately and not collectively does not bind corporation — acts of all directors who own all stock bind corporation though they act separately and not collectively — measure of damages for breach of executory contract compensable only and claim for money expended by plaintiffs for use of corporation cannot properly be included. *Gerard v. Empire Square Realty Co.*, 244.

2. Action for wrongful discharge — contract of employment contained in letter to plaintiff and written acceptance — parol evidence inadmissible to show that contract was not to become effective as to term of employment till plaintiff had demonstrated his ability — charge permitting jury to find that written instrument did not embrace real contract erroneous. *Hendricks v. Clements*, 144.

3. In action for damages for wrongful discharge count merely alleging wrongful discharge and that there is due a sum certain for unpaid salary limits recovery to salary earned and unpaid. *Inglesli v. Hickson, Inc.*, 585.

4. Pleading — where second count in action for wrongful discharge sets up matter alleged in first count and further alleges damages for failure to send plaintiff abroad as agreed in contract, and it appears that contract might be terminated at expiration of first year by giving thirty days' notice and there is sufficient time to give notice after alleged wrongful discharge, plaintiff would presumptively be entitled to balance of salary for unexpired year only, and demurrer to count was properly overruled. *Inglesli v. Hickson, Inc.*, 585.

INJURIES TO EMPLOYEES.

5. Safe place to work — in action for injury by falling of dumbwaiter caused by breaking of rope it was error to charge that the defendant owed the plaintiff duty to furnish safe place to work and sound and suitable appliances, there being no evidence that the dumbwaiter was not properly constructed or the rope when furnished was not suitable. *Brown v. Blanche Realty Co.*, 87.

6. Instructions that duty of employer to furnish safe place to work and suitable appliances was absolute is erroneous. *Brown v. Blanche Realty Co.*, 87.

WRONGS TO THIRD PERSONS.

7. Owner of apartment house not liable to infant for injuries sustained in operating dumbwaiter where plaintiff's mother was the janitress of the house and she and her husband alone were authorized to operate same. *Woerz v. Rosenfeld*, 19.

DELEGATION OF DUTY.

8. Janitress of apartment house delegating duties to her child acts outside of scope of authority and such unauthorized act causing damage cannot cast liability upon the principals. *Woerz v. Rosenfeld*, 19.

MECHANIC'S LIEN.

See LIENS.

MONOPOLIES AND COMBINATIONS.

Agreement between contractors' association and union against public policy and tending to create monopoly and to throttle competition is illegal — contractor expelled from association is entitled to injunctive relief where interfered with — unions acting as tools or instrumentalities of contractors' association become wrongdoers although having no grievance against the corporation conducted by said expelled member — acts of association and unions being malicious and wanton render each guilty of misdemeanor. *Brescia Const. Co. v. Stone Masons Contractors' Assn.*, 647.

MORTGAGES.

Plaintiff in foreclosure estopped from entering deficiency judgment where mortgagor relied on assurances that there would be no deficiency judgment — failure of mortgagor to protect self, but stipulated that action for strict foreclosure should be modified into sale — positive

MORTGAGES — Continued.

statement that deficiency judgment would not be taken is not made less positive by giving as reason that property was sufficient to cover mortgage — declaration by plaintiff that deficiency judgment would not be taken not mere expression of opinion — in action on deficiency judgment taken in Connecticut, findings by the Connecticut court that defendant was not misled by representations and declarations of plaintiff that he would not be held responsible personally, are not supported by, but are contrary to, the evidence. *Witherell v. Kelly*, 227.

MOTIONS AND ORDERS.

See, also, REFERENCES, 2-4.

Plaintiff is entitled to have resettlement of order by striking out recitals that certain papers were not read on motion where affidavit that papers were not read is not controverted. *Kedrovsky v. Archbishop & Consistory of Russian Orthodox Greek Catholic Church*, 127.

MOTOR VEHICLES.**IN GENERAL.**

1. Action against manufacturer for injuries alleged to have been caused by defective construction of automobile — defendant entitled to bill of particulars as to specific defects to be relied on and as to place of accident, speed of car and method of driving, but not as to experience of plaintiff and as to exact time of accident. *Drake v. National Motor Car & Vehicle Corp.*, 113.

INJURIES TO THIRD PERSONS.

2. Action against owner of car for death of occupant — effect of release given to owner of another car involved in same accident — verdict not against weight of evidence. *Warner v. Brill*, 64.

3. Contributory negligence is question for jury. *Joseph v. Murray*, 911.

4. Where dispute existed as to whether death resulted from accident or negligent medical treatment, verdict for defendant was properly set aside where jury instructed to find for defendant if deceased would not have died except for negligence of physician attending him. *Ryder v. Findlay*, 731.

TRIAL.

5. *Res gestæ* — action to recover for injuries sustained by child struck by automobile truck — act of driver attempting to run away not part of *res gestæ* — evidence admissible to impeach driver. *Molino v. City of New York*, 496.

MUNICIPAL CORPORATIONS.**OFFICERS.**

1. Review of decision of police executive officers upon trial of member of force — suspension of police officer for receiving bribe — refusal on advice of counsel to appear at trial in uniform and disobedience of order of commissioner of public safety on complaint of superior officer for failure to appear in uniform do not constitute insubordination — when dismissal of police officer from force should be reversed and officer reinstated — questionable whether commissioner of public safety under Second Class Cities Law, section 133, has power to require accused policeman to appear for trial in uniform. *Martin v. O'Keefe*, 814.

STREETS.

2. In action for personal injuries sustained in collision of automobile with trolley pole maintained in middle of street, maintenance of such pole did not constitute negligence either on part of company or of acquiescing city — no obligation rested on company or city to maintain grass plots around trolley pole legitimately in center of street. *Wegmann v. City of New York*, 540.

SPECIAL AND LOCAL ASSESSMENTS.

3. Sewers — statutory exemption of cemetery from assessment for construction is binding on common council, and is beyond remedy in suit by taxpayer for cancellation of assessment — assessment not extending to full depth of corner lots — omission and defects not

MUNICIPAL CORPORATIONS — Continued.

amounting to "total want of jurisdiction to levy and assess" within meaning of Second Class Cities Law — ordinance putting one-half cost of sewer less than two feet in diameter in city of second class is void under Second Class Cities Law — effect of failure of property owner to resort to procedure laid down by statute for determination of grievances. *Leonhardt v. City of Yonkers*, 234.

4. Right of commission of public works to adopt grade of engineers doing state work — record filed in its office sufficient compliance with law requiring commission to give grades to abutting owner. *Levine v. Commission of Public Works of City of Hudson*, 351.

5. Right of abutting owner to raise question of jurisdiction when required to pay assessment — system of financing by city doubtful — no bad faith and acquiescence and payment by some abutting owners — assessment should not be set aside. *Levine v. Commission of Public Works of City of Hudson*, 351.

6. Suit in equity to set aside assessment by city of Hudson for street curbing constructed under contract with State Highway Commission — waiver of defects in procedure by abutting lot owners having knowledge of defects estop them from making further complaint. *Levine v. Commission of Public Works of City of Hudson*, 351.

7. Exemption of railroad property from assessment for cost of lands taken for street purposes — vacant lot adjoining right of way and not being necessary to enjoyment of franchise is subject to assessment, although it may be needed at future time for switch tracks — increase of value by reason of extension of street warrants levy and payment of proportionate share of cost. *People ex rel. N. Y., etc., R. Co. v. City of Buffalo*, 389.

ACTIONS BY AND AGAINST.

8. Accrual of action against city — cause of action against city does not accrue until specified notice of claim is given within thirty days after injury or accident — where action is commenced within six months, time limited by charter, after service of notice, demurrer to defense of Statute of Limitations should have been sustained. *Rice v. City of Mechanicville*, 268.

[For table containing all sections of municipal charters, ordinances, etc., cited and construed in this volume, see *ante*, pp. lxxix and lxxx.]

MUNICIPAL COURT CODE.

[For table of all sections cited and construed in this volume, see *ante*, p. lxxix.]

MUNICIPAL COURTS.

See, also, HABEAS CORPUS, 1; PROHIBITION.

JURISDICTION.

1. Court's jurisdiction is not ousted by petitioner in summary proceedings alleging present ownership only. *Huyler's v. Broadway-John Street Corp.*, 410.

RULES.

2. Rule 35 of Municipal Court of City of New York providing that actions for rent, rental value or occupation of premises and actions for damages sustained through holding over of occupant shall be brought in district where premises are situated is invalid — rule established under section 17 of Municipal Court Code applies only to establishment of parts of court and does not authorize justices to abrogate Code provision and require certain classes of actions to be brought in another district — enforcement cannot be prevented by prohibition. *People ex rel. Nassoi v. Young*, 513.

NEGLIGENCE.

See, also, MASTER AND SERVANT, 5-8; MOTOR VEHICLES; MUNICIPAL CORPORATIONS, 2, 8; RELEASE, 2, 3; STREET RAILWAYS.

PROXIMATE CAUSE.

1. Where automobile passenger injured in collision died subsequently, and dispute existed as to whether death resulted from accident or negligent medical treatment, verdict for defendant was properly set aside

NEGLIGENCE — *Continued.*

where jury instructed to find for defendant if deceased would not have died except for negligence of physician attending him. *Ryder v. Findlay*, 731.

INJURY TO INVITEE.

2. Action against corporation and its president for personal injuries — injury sustained while riding in wagon with president of corporation at his request or invitation after employment ended — authority of president to invite plaintiff to ride — duty of defendant toward plaintiff — complaint raising disputed issues should not be dismissed. *Gluck v. Bedford Cleaning & Dyeing Co., Inc.*, 493.

JOINT WRONGDOER.

3. Defendant in action against him as joint tortfeasor may defend on ground that acts of other tortfeasors caused the accident, and that defendant was not negligent. *Warner v. Brill*, 64.

4. Original wrongdoer whose acts inflict injuries is not relieved by errors of surgeon or nurse. *Ryder v. Findlay*, 731.

IMPUTED NEGLIGENCE.

5. Owner of apartment house not liable for negligence of janitress in permitting infant to operate dumbwaiter. *Woerz v. Rosenfeld*, 19.

CONTRIBUTORY NEGLIGENCE.

6. Fact that passenger did not get upon or within rails of track before injury by car approaching from opposite direction does not exonerate from charge of contributory negligence. *Wall v. International Railway Co.*, 685.

7. Contributory negligence as question for jury. *Joseph v. Murray*, 911.

ACTIONS.

8. Injury to person on or near railroad track — in personal injury action verdict in favor of one injured while walking on track held to be contrary to law of case as laid down by court. *Brandorff v. Rodgers & Hagerty, Inc.*, 396.

NEGOTIABLE INSTRUMENTS.

See **BILLS AND NOTES.**

NEW TRIAL.

Court has no power to entertain or grant motion for new trial where jury is waived and formal decision rendered. *Swenson v. Trowbridge*, 310.

NEW YORK CITY.

See **ATTORNEY-GENERAL**; **INJUNCTION**, 4; **REPLEVIN**, 1; **TAXATION**, 8, 9; **TRIAL**, 2, 3.

[For tables containing all sections of various charters, codes and ordinances, etc., cited and construed in this volume, see *ante*, pp. lxxix and lxxx.]

NUISANCE.

Maintenance of dam — maintenance of dam in navigable waters is not public nuisance where water overflows plaintiff's land only through drainage ditches and not over natural bank — but where it backed up into plaintiff's drainage ditches, bottoms of which were three to five feet below top of bank, technical trespass was thereby committed damaging plaintiff — application at foot of judgment for injunction all relief to which plaintiff entitled. *Thompson v. Fort Miller Pulp & Paper Co.*, 271.

ORDINANCES.

[For table containing all municipal ordinances, etc., cited and construed in this volume, see *ante*, p. lxxx.]

PARENT AND CHILD.

See, also, **ADOPTION.**

CONTRACT BY PARENT ON BEHALF OF CHILD.

1. Contract by mother not general guardian to pay, from moneys received from third person for injuries inflicted on child, stated com-

PARENT AND CHILD — Continued.

pension for services in procuring settlement, is not enforceable. *Stuppel v. Robinowitz*, 498.

HABEAS CORPUS TO SECURE POSSESSION OF CHILD.

2. Habeas corpus to obtain possession of infant daughter sought by mother should be dismissed where respondent is respectable and financially able properly to care for the child and stepfather of child, a professional gambler, is in prison and voluntary adoption order should be sustained where it is shown that the mother voluntarily abandoned the child to the respondent. *People ex rel. Lentino v. Feser*, 91.

ANNULMENT OF MARRIAGE.

3. On annulment of marriage in action by wife on ground that she was not of age of consent, court has power to award her custody and care of issue of marriage. *Nealon v. Nealon*, 694.

PAROL EVIDENCE.

See EVIDENCE, 6, 8.

PARTIES.**PROPER PARTIES.**

1. Executrix of stockholder neither necessary nor proper party in equitable action to compel defendant to declare and distribute dividends. *Nauss v. Nauss Brothers Co.*, No. 1, 318.

JOINDER.

2. Joinder of shipowner with master in suit by seaman for being left at foreign port without excuse is proper. *Keep v. White*, 736.

PARTITION.**IN GENERAL.**

1. In suit for partition if deed of property bought at tax sale is void because of improper description in assessment roll equity cannot give relief. *McCoun v. Pierpont*, 726.

TRIAL.

2. In action for partition parties are entitled as of right to have issue tried by jury though case is noticed for trial at Equity Term — practice in First Judicial District where issues are ordered tried by jury — application to Special Term, Part III, for interlocutory judgment may be made — no issue as to wills should be stated in such action. *Sinclair v. Purdy*, 398.

PAYMENT.

Application — in an action on a promissory note given for balance due on purchase of fish, in which only question was whether payment was rightfully applied to account of transaction wholly unrelated to note, it appearing that application was applied to a purchase on which deposit had been made, but no delivery, it was error for the trial court to instruct jury that no dispute about an important issue existed, and its failing to correct error when its attention was called thereto, warranted reversal and new trial. *North American Fisheries & Cold Storage, Ltd., v. Green*, 250.

PENAL CODE.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxxviii.]

PENAL LAW.

[For table containing all sections cited and construed in this volume, see *ante*, p. lxxviii.]

PENALTIES.

See BANKS and BANKING, 2; CONTEMPT, 1; CONTRACTS, 6.

PLEADING.

See, also, CORPORATIONS, 17; LANDLORD AND TENANT, 1; LIBEL, 2; MASTER AND SERVANT, 4; PRINCIPAL AND AGENT, 3; REPLEVIN, 3; SALES, 12-16.

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PLEADING — Continued.**IN GENERAL.**

1. Pleadings should be required to abandon common-law form of pleading where statute exists. *Robison & Co., Inc., v. Kram, No. 1, 873.*

JOINDER OF ACTIONS.

2. Misjoinder of causes of action against individual defendant is made where there are allegations seeking to have it adjudged that plaintiff is entitled to certain stock of defendant corporation issued to said defendant, and to compel transfer thereof to plaintiff. *New York Income Corporation v. Wells, 136.*

AMENDMENT.

3. Amendment should be allowed plaintiff so as to state a cause of action not arising out of and in course of employment or by alleging that defendant failed to comply with the Workmen's Compensation Law. *Culhane v. Economical Garage, Inc., 108.*

COMPLAINT.

4. Complaint in action for wrongful death of servant stating cause of action for injury arising out of and in course of employment — failure to allege non-compliance with Workmen's Compensation Law — demurrer sustained. *Culhane v. Economical Garage, Inc., 108.*

5. Determination of sufficiency of complaint in equity on demurrer and after issue joined by answer and cause is brought to trial as suit in equity — complaint cannot be dismissed on ground that plaintiff was not entitled to equitable relief in event it shows action at law. *Kraemer v. World Wide Trading Co., Inc., 305.*

6. Complaint stating two causes of action — action for purchase price of goods delivered and for damages for anticipatory breach — defendant entitled to have causes of action separately stated and numbered. *Sampson v. Pels Co., 487.*

7. Complaint in action for purchase price of goods delivered and for goods tendered but not accepted where it is alleged that plaintiff delivered part of goods which defendant accepted but did not pay for and that plaintiff offered to deliver and tendered additional goods which defendant refused, is not subject to demurrer for insufficiency. *Robison & Co., Inc., v. Kram, No. 2, 878.*

DEMURRER.

8. Fact that plaintiff sought remedy under Workmen's Compensation Law is matter of defense and cannot be raised by demurrer. *Culhane v. Economical Garage, Inc., 108.*

9. In action to recover money paid in honoring draft demurrer to defense based on foreign law is properly overruled — demurrer to answer setting up usury properly sustained where there is no allegation that contract was made in New York — demurrer properly sustained which is directed to defense of two causes of action which is partial — demurrer to defense based on theory that there is lack of parties plaintiff properly sustained where there is no allegation that parties are within jurisdiction of court. *Hagenaers v. Caballero, 580.*

ANSWER.

10. Demurrer to answer setting up usury properly sustained where there is no allegation that contract was made in New York. *Hagenaers v. Caballero, 580.*

11. General denial of allegations of complaint upon information and belief is good. *Lazarus v. Wiernicki, 830.*

12. In action to recover for goods sold where complaint does not allege that goods were sold to defendant and answer is a general denial upon information and belief, motion may be made to strike out answer as frivolous — defendant thereafter may show that denials were made in good faith and really not frivolous. *Lazarus v. Wiernicki, 830.*

COUNTERCLAIM.

13. Counterclaim not pleadable against codefendant in action against corporation which does not affect plaintiff nor relate to matters stated in complaint — one defendant cannot litigate independent matter with codefendant — defendant as to whom complaint dismissed cannot be

PLEADING — Continued.

retained to litigate with codefendant. *Nauss v. Nauss Brothers Co.*, No. 2, 328.

14. Counterclaim in which defendant asks for accounting upon allegation that non-resident third parties have failed to account is subject to demurrer where allowance of the counterclaim would require presence of persons not parties to action. *Hagenaers v. Caballero*, 580.

15. Right of foreign corporation to set up counterclaim when sued in this State when license fee not paid. *Howden & Co. of America, Inc.*, v. *American Condenser & Engineering Corporation*, 882.

16. Fact that defendant claims large amount of damages, which he will probably not be able to establish, is no reason for sustaining demurrer to counterclaim. *Fromm v. Ajello*, 906.

BILL OF PARTICULARS.

17. In an action against manufacturer for injuries alleged to have been caused by defective construction of automobile, the defendant is entitled to a bill of particulars as to defect in construction or material which caused accident, specific defects to be relied on, place of accident, speed of car and method of driving — but particulars as to experience of plaintiff in driving and exact time of accident should not be granted. *Drake v. National Motor Car & Vehicle Corp.*, 113.

18. Order for bill of particulars of defense of payment will be denied unless very special reasons appear — bill will not be granted where plaintiff in action to recover balance alleged to be due on insurance premiums where plaintiff did not state details of transaction covering several thousand policies. *Yangtze Insurance Assn., Ltd.*, v. *Stark & Co., Inc.*, 401.

19. Purpose of bill of particulars — seldom granted before answer — object not to supply defects in pleading, but to limit evidence. *Royle v. McLaughlin*, 413.

20. Purpose of bill of particulars and of examination before trial stated — right to have bill of particulars served before examination of defendant before trial — inability of plaintiff to state definitely particulars required permits him to make best statement possible and state reasons for not giving details. *Zecchini v. Mayer*, 423.

21. Bill of particulars may be required as to consideration of option in action for specific performance thereof after property is conveyed to another during life of option. *Mandel v. Guardian Holding Co., Inc.*, 576.

22. Breach of contract of employment — failure to divulge information to employer — court will not compel defendant to give particulars as to information based on admissions or declarations of plaintiff and withheld by him. *Reilly v. Gutmann Silks Corporation*, 681.

JUDGMENT ON PLEADINGS.

23. On motion for judgment on pleading denials in answer must be ignored and complaint tested as on demurrer. *Brodsky v. Rieser*, 557.

IMMATERIAL ALLEGATIONS.

24. In action for breach of warranty under contract of sale, allegations in complaint as to nationality and non-residence of defendant immaterial and motion to strike same out properly made by defendant. *Symington v. Haxton*, 85.

INDEFINITE ALLEGATIONS.

25. On motion to make complaint definite and certain question is whether one or more allegations are so indefinite or uncertain that precise meaning is not apparent — in action for price of goods sold, failure to allege date or dates on which goods were sold makes allegation uncertain — relief by bill of particulars not equivalent to order to make definite and certain. *Royle v. McLaughlin*, 413.

[For table containing all sections of the Code of Civil Procedure cited and construed in this volume, see *ante*, p. lxxvii.]

PRACTICE.

See PLEADING.

PRESUMPTIONS.

See EVIDENCE, 1; STREET RAILWAYS, 2.

PRINCIPAL AND AGENT.

See, also, BAILMENTS; LANDLORD AND TENANT, 1.

CREATION AND EXISTENCE OF RELATION.

1. Rules of Cotton Exchange that brokers deal as principals do not preclude making of contract between customer and broker, by which as between them broker should become agent of customer. *Scandinavian Import-Export Co., Inc., v. Backman*, 297.

RIGHTS OF AGENT.

2. Marginal contracts — action by stockbroker to recover balance due on marginal account — error to charge jury that verdict for defendant might be rendered not on theory that second order was purchased but that plaintiff would have purchased before such time and at price which would have left credit balance in favor of defendant — right of broker where customer repudiated order to sell stock short — failure of purchasers to give directions, brokers were within right in purchasing stock at market, at time and place specified, to cover short sales. *Newburger v. Levinson*, 502.

AGENT'S LIABILITY.

3. In action for alleged conversion of stock, the question whether defendants agreed to carry said stock or whether sale was for cash, evidence sufficient to show that defendants did not convert stock by sale — dismissal of complaint should have been granted — acceptance of check and retention of proceeds constitute ratification of broker's act. *Jacobs v. Moore*, 452.

RATIFICATION OF ACT OF AGENT.

4. Acceptance of check for unliquidated claim from broker and retaining proceeds of same constitutes ratification of broker's acts as agent for his client. *Jacobs v. Moore*, 452.

COMMISSIONS.

5. Salesman's contract for compensation by way of commissions on sales made within special territory does not entitle him to commissions on sales for articles to be used in a foreign land, and for which negotiations were made outside the territory although contract for goods was signed within territory. *Wachtel v. Mosler & Co.*, 240.

6. Measure of damages for loss of commission on failure of purchaser to take coal purchased from plaintiff's principal, would be agreed commissions if reasonable. *Newman v. Pierson*, 407.

7. In action for damages caused by defendant failing to perform agreement to purchase coal from plaintiff's principal whereby plaintiff lost commissions, it is not necessary to allege agreed commissions were reasonable value of services. *Newman v. Pierson*, 407.

8. In action for commissions measure of damages is amount of commissions seller had agreed to pay plaintiff on sale, if reasonable. *Newman v. Pierson*, 407.

9. In action to recover damages for failure to perform agreement of purchase it is not necessary for plaintiff to allege that agreed commissions were reasonable value of his services. *Newman v. Pierson*, 407.

10. Action for commissions for securing purchasers for real property who would assume obligation of bond — evidence insufficient to show that defendants agreed to formation of corporation for purchase of property and plaintiff was not entitled to commissions. *Rusher v. Wall*, 490.

11. In action to recover commissions under oral agreement to procure government contract, it was error for court to refuse defendant's offer to prove by parol evidence that commissions were to be paid on goods actually delivered — error to refuse defendant's request to instruct jury that oral testimony offered might be considered in connection with letter. *Metzger v. Coe-Stapley Manufacturing Corporation*, 664.

12. When agent procured purchaser agreeing to defendant's terms defendant had no right arbitrarily to change terms. *Polo v. Scheidt*, 903.

PRIVILEGED COMMUNICATIONS.

See LIBEL.

PROBATE.

See WILLS, 4-7.

PROCESS.

PERSONAL SERVICE.

1. Service of summons on corporation will not be set aside on ground that it was not made on managing agent, authorized to receive service, where facts show exercise of powers of managing agent by person who alone is in apparent charge and control. *Municipal Mortgage Co. v. 461 8th Ave. Co., Inc.*, 370.

SERVICE BY PUBLICATION.

2. Order for publication may be granted in action for money only against non-resident although attachment has not been levied — Code of Civil Procedure, sections 438, 439, as amended by Laws of 1920, chapter 478, construed — additional affidavits in support of warrant of attachment cured any infirmity in those originally submitted. *Del Piatta v. Mendoza*, 833.

SERVICE ON FOREIGN CORPORATIONS.

3. Service can only be made on president of corporation temporarily within State when corporation doing business within State. *Sunrise Lumber Co., Inc., v. Biery Lumber Co.*, 170.

PROFESSIONAL MISCONDUCT.

See ATTORNEY AND CLIENT, 2, 3.

PROHIBITION.

1. Writ will not lie to restrain justice of Municipal Court of City of New York from transferring pending case to another district. *People ex rel. Wiesenthal v. Dunne*, 225.

2. Prohibition not proper remedy to prevent enforcement of invalid rule of Municipal Court of New York City. *People ex rel. Nassoi v. Young*, 513.

PROMISSORY NOTES.

See BILLS AND NOTES.

PUBLIC SERVICE COMMISSION.

See, also, GAS AND ELECTRICITY, 1, 2, 4, 5; RAILROADS, 1.

Findings of Commission will not be disturbed where, if made by jury, they would not be set aside as against weight of evidence. *People ex rel. N. Y. C. R. R. Co. v. Pub. Serv. Comm.*, 426.

RAILROADS.

See, also, APPEAL, 3; MUNICIPAL CORPORATIONS, 2.

RECONSTRUCTION OF SWITCH.

1. Public Service Commission has jurisdiction to compel reconstruction of switch between railroads, Federal Transportation Act of 1920 not being applicable — evidence fully establishes necessity and convenience for reconstruction in this case. *People ex rel. N. Y. C. R. R. Co. v. Pub. Serv. Comm.*, 426.

INJURY TO PASSENGERS.

2. Release by mail clerk for personal injury is valid even though railroad company's negligence is conceded, no fraud being practiced and there being no mutual mistake of fact. *Miles v. New York Central Railroad Co.*, 748.

INJURY TO PERSON ON OR NEAR TRACK.

3. In personal injury action verdict in favor of one injured while walking on track held to be contrary to law of case as laid down by court. *Brandorff v. Rodgers & Hagerty, Inc.*, 396.

RATES.

4. Injunction *pendente lite* should not issue enjoining railroad from fixing rates where Federal courts have jurisdiction. *People v. Long Island Railroad Co.*, 897.

RAPE.

See CRIMES, 3.

RATES.

See APPEAL, 3; GAS AND ELECTRICITY, 1-5; RAILROADS, 4.

REAL PROPERTY.

See, also, EASEMENTS; EJECTMENT; LANDLORD AND TENANT; PARTITION; PRINCIPAL AND AGENT.

Action to recover real property and remove telephone poles where title is derived from State but no patent has issued under section 35 of Public Lands Law, *held* that at time of commencement of action plaintiff had good title to said land — defendant not claiming title to land cannot raise question that plaintiff has not received patent therefor — fact that Federal Government was in control of property temporarily is not good defense. *McPhillips v. New York Telephone Co.*, 643.

RECEIVERS.

See, also, CORPORATIONS, 15.

COSTS WHERE ACTION DISCONTINUED.

1. Where a stockholder of corporation has asked for an accounting and receivership and by stipulation between parties action is discontinued without costs, stockholder is liable for services and expenses of receivers. *McHarg v. Commonwealth Finance Corporation*, 862.

FOREIGN CORPORATIONS.

2. Courts of this State have jurisdiction to intervene in behalf of stockholders of foreign corporations and appoint receiver therefor. *McHarg v. Commonwealth Finance Corporation*, 862.

REFERENCES.

See, also, CONTEMPT, 2.

COMPULSORY REFERENCES.

1. Suit to have statutes fixing gas rates declared unreasonable and confiscatory — court may order reference where long and complicated accounts must be examined. *Bronx Gas & Electric Co. v. Public Service Comm., First Dist.*, 554.

ON MOTIONS.

2. Reference on motion to set aside service of summons should not be ordered to take proof and report where facts show that person served with process was managing agent of corporation. *Municipal Mortgage Co. v. 461 8th Ave. Co., Inc.*, 370.

3. Orders of reference upon motions should rarely be made and should be resorted to only in exceptional cases. *Slutzkin v. Gerhard & Hey, Inc.*, 559.

4. Suspending prosecution of action — on motion for arrest and suspension of prosecution of action where trial court determined that there were disputed facts arising from conflicting affidavits, a reference ordered as to several items was improper where same queries were admitted or not controverted, and other queries were either matters to be decided at later stage of case or were wholly irrelevant. *Slutzkin v. Gerhard & Hey, Inc.*, 559.

REGULATIONS.

[For tables containing all United States and municipal regulations cited and construed in this volume, *see ante*, p. lxxx.]

RELEASE.

See, also, EXECUTORS AND ADMINISTRATORS, 5.

VALIDITY.

1. Agreement to execute release though not signed by defendant may be good defense to action on note. *Gold v. Ross*, 721.

2. Release by mail clerk for personal injury is valid even though railroad company's negligence is conceded, no fraud being practiced and there being no mutual mistake of fact. *Miles v. New York Central Railroad Co.*, 748.

RELEASE — Continued.**EFFECT.**

3. Release given to owner of another automobile does not preclude action against joint wrongdoer, since Debtor and Creditor Law allows joint debtor to make separate composition with his creditors — composition does not impair plaintiff's rights unless intent to release appears affirmatively upon face of instrument. *Warner v. Brill*, 64.

REPLEVIN.**WHEN ACTION MAINTAINABLE.**

1. Property seized by clerk of police department of city of New York and not held or required as evidence may be recovered in replevin by assignee of person arrested — neither Greater New York charter nor Code of Criminal Procedure is bar to action — liability of clerk for refusal to deliver property — sufficiency of evidence to show bad faith on part of property clerk. *Duboff v. Haslan*, 117.

2. By one tenant in common against another — tenant and landowner become tenants in common of hay which tenant cuts under agreement to work farm on shares, and tenant, after demand and refusal, may maintain replevin for his share. *Taylor v. Embury*, 633.

COMPLAINT.

3. Complaint in action against property clerk in New York city police department to recover property seized and delivered to defendant's predecessor and by him to defendant, held to state facts sufficient to constitute a cause of action. *Duboff v. Haslan*, 117.

RES IPSA LOQUITUR.

See **STREET RAILWAYS**, 3.

RES JUDICATA.

See **HUSBAND AND WIFE**, 5; **JUDGMENT**, 2.

REVISED LAWS.

See **STATUTES**.

[For table containing all chapters cited and construed in this volume, see *ante*, p. lxviii.]

REVISED STATUTES.

See **STATUTES**.

[For table containing all parts, chapters, titles and sections cited and construed in this volume, see *ante*, p. lxvii.]

REVIVOR.

See **WILLS**, 7.

ROBBERY.

See **CRIMES**, 4.

RULES.

See **APPEALS**, 1; **COURTS**, 3; **MUNICIPAL COURTS**, 2.

[For table of Trial Term and Municipal Court Rules and all other rules cited and construed in this volume, see *ante*, p. lxxix.]

SALES.

See, also, **ARBITRATION**, 3; **CONVERSION**, 2.

CONTRACT OF SALE.

1. Correspondence between parties for the purpose of reducing to writing contract which they had made through broker sufficient to show *prima facie* making of contract — letter of buyer which would have been merely reiteration of seller's consent to buyer's proposition with respect to time of payment not condition precedent to making of valid contract. *Asinof & Sons, Inc., v. Freudenthal*, 79.

INTERPRETATION AND CONSTRUCTION OF CONTRACTS.

2. Judicial notice — court will take judicial notice of meaning of "sale of whisky in bond." *Turner-Looker Co. v. Aprille*, 708.

PERFORMANCE AND BREACH.

3. Condition in written contract may be waived by parol where seller knows condition has been filled — whether condition has been

SALES — Continued.

waived or abandoned by seller, by statements and representations, is for determination of jury. *Bellas Hess & Co., Inc., v. Alexander & Co., Inc.*, 313.

4. Action by trustee in bankruptcy of buyer to recover for breach of contract of sale and purchase of quinine — failure of buyer to make payment on time pursuant to agreement constitutes breach. *Strasbourg v. Leerburger*, 480.

5. Embargo by foreign government in midst of World War is no defense to action for failure to deliver goods — when equity will give no relief on ground of mistake as to shipping conditions — prohibition of War Trade Board not effective after expiration of contract period. *Krulewitch v. National Importing & Trading Co., Inc.*, 544.

6. Tender of certified registered bonded warehouse certificate of whisky is equivalent to tender of whisky. *Turner-Looker Co. v. Aprile*, 706.

7. Title to whisky having passed plaintiff had right to sue for and recover contract price even though defendant had refused to accept it, under subdivision 1 of section 144 of Personal Property Law. *Turner-Looker Co. v. Aprile*, 706.

8. Damages on breach of contract to deliver coal during summer and winter of 1918 computed at thirty cents per ton in summer and fifty cents per ton in winter — control of coal by government did not affect contract to deliver seventy-eight tons per week — failure to pay for coal weekly immaterial. *Marrone v. Somers Coal Co., Inc.*, 903.

PASSING OF TITLE.

9. Overcoat clippings already made up in deliverable state at time written order therefor is received and bale of worsted clippings is in existence and only required sorting, title passed when latter were sorted and three bales set aside and tagged — no place of delivery specified in contract — seller's place is place of delivery — considering transaction as contract of sale, title to bale of worsted clippings would pass when put up, tagged and set aside in deliverable condition — consent of buyer to appropriation implied by sending truckman for goods, and by not making claim of right to make selection. *Boiko & Co., Inc., v. Atlantic Woolen Mills, Inc.*, 207.

WARRANTIES.

10. Action for breach of warranty of house-heating plant — defense that plant was sold to and warranty given to dealer and not to plaintiff not sustained — interpretation of contract of warranty — use of boiler after test does not waive right to repudiate contract for breach of warranty — offer to return defective plant not necessary where defendant refuses to receive. *Stone v. Molby Boiler Co.*, 68.

11. In action for breach of warranty under contract of sale, allegations in complaint as to nationality and non-residence of defendant immaterial and motion to strike same out properly made by defendant. *Symington v. Hazton*, 85.

PLEADING.

12. Failure to allege date or dates of sales renders complaint indefinite and uncertain. *Royle v. McLaughlin*, 413.

13. Complaint stating two causes of action — action for purchase price of goods delivered and for damages for anticipatory breach — defendant entitled to have causes of action separately stated and numbered. *Sampson v. Pels Co.*, 487.

14. In action to recover price of goods sold instituted after goods had been tendered and refused, it is not necessary to allege when contract was to be performed. *Turner-Looker Co. v. Aprile*, 706.

15. Complaint in action to recover purchase price of goods not delivered does not state cause of action under Personal Property Law where facts showing passing of title not alleged — pleading should follow rule 1 of section 100 of Personal Property Law as to passing of title. *Robison & Co., Inc., v. Kram, No. 1*, 873.

16. Complaint in action for purchase price of goods delivered and for goods tendered but not accepted where it is alleged that plaintiff delivered part of goods which defendant accepted but did not pay for

SALES — Continued.

and that plaintiff offered to deliver and tendered additional goods which defendant refused, is not subject to demurrer for insufficiency. *Robison & Co., Inc., v. Kram, No. 2, 878.*

TRIAL.

17. Evidence — in an action for breach of contract for the manufacture and sale of goods, evidence held to make out *prima facie* case of valid contract. *Bellas Hess & Co., Inc., v. Alexander & Co., Inc., 313.*

18. On claim that goods were not as warranted letter from buyer stating reason for rejecting goods was admissible. *Klein v. Smith, 876.*

19. In action to recover purchase price of cloth, recovery cannot be had where proof was that of amount of goods delivered each piece contained 45 to 60 yards at agreed price per yard as there was no basis on which jury could calculate damages — error for court to charge that there was no dispute that plaintiff had sold and delivered merchandise of value alleged in complaint. *Klein v. Smith, 870.*

SECOND CLASS CITIES.

See MUNICIPAL CORPORATIONS, 3.

SEPARATION.

See HUSBAND AND WIFE, 4-9.

SESSION LAWS.

[For table containing all Session Laws cited and construed in this volume, see *ante*, p. lxxiii.]

SEWERS.

See MUNICIPAL CORPORATIONS, 3.

SHIPS AND SHIPPING.

Action by seaman left on voyage to recover damages against ship-owner and master is remediable by maritime law — such liability is enforceable in State court. *Keep v. White, 736.*

SPECIAL AND LOCAL ASSESSMENTS.

See, also, MUNICIPAL CORPORATIONS, 3-7.

EXEMPTIONS.

1. Statutory exemption of cemetery from assessment for construction is binding on common council, and is beyond remedy in suit by taxpayer for cancellation of assessment — assessment not extending to full depth of corner lots — omission and defects not amounting to "total want of jurisdiction to levy and assess" within meaning of Second Class Cities Law — ordinance putting one-half cost of sewer less than two feet in diameter is void under Second Class Cities Law — failure of property owner to resort to procedure laid down by statute for determination of grievances, effect of. *Leonhardt v. City of Yonkers, 234.*

2. Exemption of railroad property from assessment for cost of lands taken for street purposes — vacant lot adjoining right of way and not being necessary to enjoyment of franchise is subject to assessment, although it may be needed at future time for switch tracks — increase of value by reason of extension of street warrants levy and payment of proportionate share of cost. *People ex rel. N. Y., etc., R. Co. v. City of Buffalo, 389.*

SETTING ASIDE ASSESSMENT.

3. Suit in equity to set aside assessment by city of Hudson for street curbing constructed under contract with State Highway Commission — waiver of defects in procedure by abutting lot owners having knowledge of defects estops them from making further complaint. *Lerine v. Commission of Public Works of City of Hudson, 351.*

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 5-9.

STATUTE OF FRAUDS.

Sale of cable transfer of exchange is transfer of existing credit and is sale of chose in action which must be in writing to be enforceable if of value of more than fifty dollars. *Equitable Trust Co. v. Keene, 384.*

STATUTES.

See, also, CONSTITUTIONAL LAW, 1.

Sufficiency of emergency message by Governor certifying to necessity for immediate passage of bill — when examination of official records of Legislature to determine validity of statute is permissible — certification by Secretary of State as to passage of act does not preclude inquiry whether it was properly passed — parol evidence cannot be received to impeach official certification or journals of respective houses. *People ex rel. Durham Realty Corporation v. La Fetra*, 280.

[For tables of the Session Laws and Statutes cited and construed in this volume, see *ante*, p. lxvi et seq.]

STAY OF PROCEEDINGS.

See APPEAL, 10.

STOCKBROKER.

See CONTRACTS, 1, 4; CONVERSION, 1; PRINCIPAL AND AGENT, 1-4.

STOCKHOLDERS.

See CORPORATIONS, 4.

STREET RAILWAYS.

INJURY TO THIRD PERSON.

1. Maintenance of trolley pole in street — in action for personal injuries sustained in collision of automobile with trolley pole in middle of street, maintenance of such pole did not constitute negligence either on part of company or of acquiescing city — no obligation rested on company or city to maintain grass plots around trolley pole legitimately in center of street. *Wegmann v. City of New York*, 540.

INJURY TO PASSENGER.

2. Presumptions — in action for injury through collision of street car with motor truck court may properly charge that negligence may be presumed on part of carrier in absence of explanation of cause of accident consistent with ordinary care — such presumption rests upon duty carrier owes to passengers in connection with circumstances showing injury might have been occasioned by failure to perform such duty. *Plumb v. Richmond Light & R. R. Co.*, 254.

3. *Res ipsa loquitur* doctrine — action by passenger injured when struck by motor truck colliding with motor car — doctrine of *res ipsa loquitur* is not applicable since all agencies causing accident are not in control of either defendant. *Plumb v. Richmond Light & R. R. Co.*, 254.

4. Duty of alighting passenger — alighting passenger passing to rear of car must be satisfied that no car is operating on the adjoining track before passing into danger zone — fact that passenger did not get upon or within the rails of another track before injury does not exonerate from the charge of contributory negligence. *Wall v. International Railway Co.*, 685.

STREETS.

See MUNICIPAL CORPORATIONS, 2.

SUBMISSION OF CONTROVERSY.

The court is not at liberty to draw inferences from facts stipulated. *Lafrinz v. Whitney*, 131.

SUMMARY PROCEEDINGS TO DISPOSSESS.

See, also, LANDLORD AND TENANT, 5-10.

JURISDICTION.

1. Court's jurisdiction is not ousted by petitioner in summary proceedings alleging present ownership only. *Huyler's v. Broadway-John Street Corp.*, 410.

PERSONS AGAINST WHOM PROCEEDINGS MAY NOT BE MAINTAINED.

2. Summary proceedings cannot be maintained against tenant for failure to obey order of fire department respecting requirements of Labor Law, though lease contains covenant for forfeiture for failure so to do — such proceedings cannot be maintained under section 94

SUMMARY PROCEEDINGS TO DISPOSSESS — Continued.

of the Labor Law where lease did not obligate compliance with Labor Law but only with orders of municipal and other lawful authorities — ejection proper remedy. *Davis Brothers Realty Corporation, Inc., v. Harte*, 403.

PRECEPT.

3. Mandamus is appropriate proceeding to compel issuance of precept in summary proceedings. *People ex rel. Durham Realty Corporation v. La Fetra*, 280.

INJUNCTION RESTRAINING PROCEEDINGS.

4. Summary proceedings in Municipal Court of City of New York will not be restrained where matters set up constitute defenses which may be set up in answer. *Huyler's v. Broadway-John Street Corp.*, 410.

5. Injunction granted to restrain summary proceedings pending suit for specific performance of an agreement to renew lease — adequate remedy could not be afforded plaintiff in summary proceedings in Municipal Court of City of New York — summary proceedings tried after denial of injunction — injunction order not issued on appeal — leave may be given to apply for injunction if judgment in summary proceedings is reversed. *Loughman v. Lilliendahl*, 867.

SUMMONS.

See PROCESS.

SURROGATE'S COURT.

Jurisdiction — reinstatement of mortgage and cancellation of satisfaction piece cannot be made — offset of lapsed claim against distributive share. *Matter of Falcon*, 909.

TAXATION.

See, also, PARTITION, 11; SPECIAL AND LOCAL ASSESSMENTS.

ASSESSMENT GENERALLY.

1. Oil wells on leased land are assessable as real property against foreign corporation. *Matter of Hazelwood Oil Co.*, 23.

2. Listing property — assessment roll which omits first column ditto marks, referring to name and subdivision, but correctly uses them in column for owners, is imperfect — reference to map apparently not existing — tax sale notice is insufficient and void which mentions no map and gives no description of property. *McCoun v. Pierpont*, 726.

3. Where evidence leaves matter in doubt, it is province of assessors to determine value and amount of property subject to taxation — assessors are not limited to rules of evidence prevailing in courts. *People ex rel. Haile v. Parow*, 745.

REVIEW OF ASSESSMENT.

4. Conclusiveness of determination of assessors — determination of assessors not disturbed unless it clearly appears injustice has been done. *People ex rel. Haile v. Parow*, 745.

5. Costs — assessors are entitled to costs and disbursements where assessment sustained on review. *People ex rel. Haile v. Parow*, 745.

6. Review of assessment of property including mineral right — assessment sustained where relator has not overcome presumption that assessment is correct nor met burden of proof to show assessment erroneous. *People ex rel. Haile v. Parow*, 745.

SETTING ASIDE ASSESSMENT.

7. Suit in equity to set aside assessment by city of Hudson for street curbing constructed under contract with State Highway Commission — waiver of defects in procedure by abutting lot owners having knowledge of defects estops them from making further complaint. *Levine v. Commission of Public Works of City of Hudson*, 351.

BOARD OF ASSESSORS.

8. Assessment — resolution of assessors of city of New York reducing assessment may not be disregarded by new board although assessment roll is not changed. *People ex rel. Morewood Realty Holding Co. v. Cantor*, 190; *People ex rel. Marlowe Amusement Co. v. Cantor*, 193.

9. Filing decision of tax board — Greater New York charter requiring decision of tax board to be filed within thirty days after close of

TAXATION — Continued.

hearing is merely directory — failure to act within thirty days gives new board no jurisdiction to act. *People ex rel. Morewood Realty Holding Co. v. Cantor*, 190; *People ex rel. Marlowe Amusement Co. v. Cantor*, 193.

TAX SALE.

10. Tax notice mentioning no map and giving no description by which property can be identified is insufficient. *McCoun v. Pierpont*, 726.

11. Refund — under section 156 of Tax Law, refund may be claimed of what was paid for deed on void sale. *McCoun v. Pierpont*, 726.

INCOME TAX.

12. Person is engaged in carrying on business within section 351 of Tax Law, where he maintains office for buying and selling goods for foreign trade although goods are stored only to await cargo space, and where he fills orders received by commission merchants from foreign trade — tax laid thereon is not tax on exports within meaning of Federal Constitution — re-enactment of Tax Law curing portion formally declared unconstitutional does not render assessment invalid by the fact that it is retroactive in operation. *People ex rel. Stafford v. Travis*, 635.

13. Effect of re-enactment — it is not necessary to reimpose a tax after a portion of a tax law has been declared unconstitutional where Legislature subsequently corrects defect. *People ex rel. Stafford v. Travis*, 635.

TRANSFER TAX.

14. Stock of domestic corporation owned by decedent and pledged as collateral to another domestic corporation for loan larger than value of pledge is not part of assessable assets — payment by executor of part of loan does not make excess of collateral assessable — issuance of ancillary letters does not alter rule. *Matter of Hallenbeck*, 381.

15. Trust deeds conveying property to trustee to have and to hold and to invest same and to receive income, issues and profits pass title to trustee, and property is not subject to transfer tax on death of trustor — reservations by trustor of privilege with approval of trustee of altering, amending or extending terms of trust, coupled with failure of trustor to exercise right during lifetime is immaterial. *Matter of Bowers*, 548.

TENANTS IN COMMON.

Replevin — tenant and landowner become tenants in common of hay which tenant cuts under agreement to work farm on shares, and tenant, after demand and refusal, may maintain replevin for his share. *Taylor v. Embury*, 633.

TRESPASS.

See CANALS; NUISANCE.

TRIAL.

See, also, CRIMES, 1; MOTOR VEHICLES, 5; REFERENCES; SALES, 17-19; STREET RAILWAYS, 2; WILLS, 4-7.

IN GENERAL.

1. Defendant cannot raise question after commencement of action for purchase price of whisky that plaintiff disposed of same where defendant did not ask to amend his answer. *Turner-Looker Co. v. Aprile*, 706.

TRIAL BY JURY.

2. In action for partition parties are entitled as of right to have issue tried by jury though case is noticed for trial at Equity Term — practice in First Judicial District where issues are ordered tried by jury — application to Special Term, Part III, for interlocutory judgment may be made — no issue as to wills should be stated in such action. *Sinclair v. Purdy*, 398.

PLACE OF TRIAL.

3. Change of venue in action by domestic corporation will be denied where action is brought in county to which it has removed its principal

TRIAL — Continued.

place of business — affidavits on alleged convenience of witnesses on motion to change venue insufficient — trial preferred in rural counties rather than in New York city. *Carvel Court Realty Co., Inc., v. Jonas*, 662.

EVIDENCE.

4. Testimony by proponent of will that neither she nor her sister requested father to make will in her favor was not incompetent under section 829 of Code of Civil Procedure, where evidence had been admitted that such request had been made and that father had refused. *Matter of Gratton*, 32.

INSTRUCTIONS.

5. Charge that jury might consider failure of proponent of will to call doctor who was third witness, while not reversible error, is subject to criticism. *Matter of Bossom*, 339.

VERDICT.

6. Damages excessive where evidence insufficient to show that condition of eye was due solely to accident. *Herbst v. Bellack*, 928.

OPENING CASE.

7. Motion after dismissal of complaint to open case and introduce new evidence should be granted where only issues litigated can be determined thereby. *Asserson v. City of New York*, 12.

TRUSTS.

See, also, TAXATION, 15.

Transfer of property before entry of judgment — trust will not be impressed on certain property which was transferred after verdict and before judgment entered — lien of judgment is not prior to that of deed. *Boyle v. Blankenhorn*, 265.

ULTRA VIRES CONTRACTS.

See CORPORATIONS, 6, 7.

UNITED STATES.

[For tables containing all sections of the United States Constitution, Revised Statutes, Statutes, Criminal Code, Judicial Code, Proclamations and Regulations cited and construed in this volume, see *ante*, pp. lvi, lvii and lxxx.]

UNITED STATES SHIPPING BOARD.

See CORPORATIONS, 11.

USURY.

See BANKS AND BANKING, 2.

VENDOR AND PURCHASER.

See, also, PRINCIPAL AND AGENT, 10.

CONTRACT OF SALE.

1. Mechanics' liens filed between date of contract of purchase and date for closing constitute incumbrance. *Roberts v. New York Life Ins. Co.*, 97.

2. Obligation of parties to an executory contract of purchase are concurrent and dependent — no recovery of damages for vendor's breach can be had without allegation and proof of vendee's readiness and willingness to perform — tender and demand by vendee not necessary where vendor refuses in advance to comply with terms, or places himself in position where performance is impossible. *Roberts v. New York Life Ins. Co.*, 97.

INCUMBRANCES.

3. Mechanics' liens filed between date of contract of purchase and date for closing constitute an incumbrance and the purchaser has the right to recover back payment on account of purchase price where vendee refuses to remove such incumbrance. *Roberts v. New York Life Ins. Co.*, 97.

VENDOR AND PURCHASER — *Continued.***EFFECT OF CONTRACT ON TITLE.**

4. Contract for sale of real property does not create objection to title — different situation may be created, however, where deed contains clause stating that it is subject to option agreement. *Mandel v. Guardian Holding Co., Inc.*, 576.

SPECIFIC PERFORMANCE.

5. Bill of particulars may be required as to consideration of option in action for specific performance thereof after property is conveyed to another during life of option. *Mandel v. Guardian Holding Co., Inc.*, 576.

6. Before judgment for specific performance of contract to convey by metes and bounds is made, parol evidence should be admitted to establish metes and bounds where description is not given in contract. *Weintraub v. Kruse*, 807.

7. Where a wife refuses to join in deed and has been examined as witness orderly procedure is for plaintiff to elect to sue for damages or to take subject to wife's dower with abatement in consideration. *Weintraub v. Kruse*, 807.

8. If plaintiff seeks damages instead of specific performance where wife refuses to join in conveyance, evidence as to age of husband and wife requisite to determine value of dower right should be submitted at trial. *Weintraub v. Kruse*, 807.

9. Discretion of court in refusing specific performance of contract will not be interfered with where defendant had granted many extensions of time without result. *Weeks v. Miller*, 909.

VENUE.

See CORPORATIONS, 2; TRIAL, 3.

WAIVER.

Condition as to manufacture of goods — waiver of condition in written contract may be waived by parol where seller knows condition has been filled — whether condition has been waived or abandoned, by seller, by statements and representations, is for determination of jury. *Bellas Hess & Co., Inc. v. Alexander & Co., Inc.*, 313.

WARRANTY.

See ARBITRATION 1; SALES, 10, 11.

WAR TRADE BOARD.

See SALES, 5.

WATERS AND WATERCOURSES.

See, also, CANALS.

Hudson river between Washington and Saratoga counties is navigable. *Thompson v. Fort Miller Pulp & Paper Co.*, 271.

WILLS.

See, also, PARTITION, 2.

EXECUTION.

1. A codicil which was properly executed and referred to a will annexed thereto did not make the defectively executed will part of the codicil or authorize its probate. *Matter of Lawler*, 27.

LEGACIES.

2. Construction of bequest "to each person * * * customarily employed as part of my household," includes watchman performing duties in and about premises under supervision of testator or butlers employed by him. *Lafrinz v. Whitney*, 131.

3. Legatee who has assigned legacy for advances in excess of distributive share and who is also judgment creditor of another legatee, has no standing in court on judicial settlement. *Matter of Pluym*, 565.

PROBATE.

4. Where evidence introduced as to execution of will was conflicting and raised clear question of fact, it was error for surrogate to refuse to submit to jury question whether will was executed in compliance with

WILLS — Continued.

Decedent Estate Law, section 21, and to hold as matter of law that will had been properly executed. *Matter of Lawler*, 27.

5. Testimony by proponent of will that neither she nor her sister requested father to make will in her favor was not incompetent under section 829 of Code of Civil Procedure, where evidence had been admitted that such request had been made and that father had refused. *Matter of Gratton*, 32.

6. Finding of lack of testamentary capacity and undue influence against weight of evidence — party who has been called to stand to testify may be contradicted and credibility impaired by witnesses called for such purpose without putting same question in form to party — instruction that jury might consider failure of proponent to call doctor, third witness to will, while not reversible error, is subject to criticism. *Matter of Bossom*, 339.

7. Motion by administratrix of contestant for revival of lapsed proceeding to set aside decree of probate after abortive attempts to establish claim against estate will be denied, especially where inference of bad faith exists and validity of will had been determined in prior proceeding. *Matter of Leslie*, 571.

WITNESSES.

See, also, CONTEMPT, 2; TRIAL, 3.

Witness not guilty of contempt by refusing to testify before referee where order of reference was granted and refusal to testify took place before complaint was verified and summons served. *Finkenberg, Inc., v. Crompton Building Corporation*, 20.

WORKMEN'S COMPENSATION LAW.

See, also, PLEADINGS, 3, 4, 8.

PURPOSE OF LAW.

1. Purpose of Workmen's Compensation Law was to provide compensation for industrial accidents inherent in modern system of production. *Donovan v. Alliance Electric Co.*, 678.

THEORY OF LAW.

2. Theory of Workmen's Compensation Law is that accidents of industry are proper overhead charges — Commission cannot enlarge scope of statute to include infectious diseases. *Donovan v. Alliance Electric Co.*, 678.

CONSTITUTIONALITY.

3. Provision for payment of death benefit to treasurer — provision of Workmen's Compensation Law relative to payment to State Treasurer of \$900, where no dependents survive is valid. *Watkinson v. Hotel Pennsylvania*, 624.

ADMIRALTY AND MARITIME EMPLOYMENT.

4. Jurisdiction may not be determined by parties and question may be raised first on appeal — expert stevedore employed by shipper to supervise loading of cargo is not engaged in maritime employment — test as to whether employee is engaged in maritime employment. *Newham v. Chile Exploration Co.*, 291.

RELATION OF PARTIES.

5. Evidence held to show that person cutting timber was not employee of alleged employer, a corporation, at time of his death. *Sheels v. Paul Smith's Hotel Co.*, 39.

6. Applicant for work injured during test respecting knowledge of operation of machine is not employee. *Lederson v. Cassidy & Dorfman*, 613.

7. Independent contractor injured while painting building for third party is not entitled to compensation. *Svolos v. Marsch & Co.*, 674.

ELECTION OF EMPLOYER.

8. Election by employer to come under provisions of statute evidenced by posting notices in men's rooms at boarding house. *Posey v. Moynahan*, 440.

WORKMEN'S COMPENSATION LAW — Continued. }**EXEMPTED PURSUITS.**

9. Barnman in employ of person in lumbering business is not engaged in farming although farm is operated as adjunct to principal business. *Posey v. Moynahan*, 440.

ACCIDENTAL INJURY OR DEATH.

10. "Lobar pneumonia" with "contributory myocarditis" — injury to side causing. *Delso v. Crucible Steel Co.*, 288.

11. Death from heart disease following injury — evidence does not establish causal relation between. *Neslor v. Pabst Brewing Co.*, 434.

12. Death from pulmonary tuberculosis following injury — evidence established causal relation between injury to ear washer and subsequent death thereafter from tuberculosis. *McGoey v. Turin Garage & Supply Co.*, 436.

13. Statement of watchman found in dying condition confirmed by physical facts is sufficient to warrant a finding that an accident occurred. *O'Sullivan v. Woods Theatre Co.*, 609.

14. Bell boy who was missed during tour of hotel while on duty and later found dead in elevator shaft, held to have met death by accident. *Watkinson v. Hotel Pennsylvania*, 624.

15. Diphtheria — millwright contracting diphtheria after exposure is not injured by accident where his work for three or four months had from time to time caused like exposure. *Bizby v. Cotswold Comfortable Co.*, 659.

16. Freezing — employee freezing hand while floating ice at time when thermometer registers fourteen degrees below zero, suffers accident. *Quick v. Illston Ice Co.*, 676.

17. Employee sustaining blow on head who subsequently developed sleeping sickness, does not suffer accidental injury — said disease is infectious and not due to trauma. *Donovan v. Alliance Electric Co.*, 678.

18. Pneumonia — insufficiency of evidence that accidental injury created weakened condition or that weakened condition existed when pneumonia was contracted, or that there was any causal connection between injury and death. *Rauth v. Schaefer & Son*, 951.

ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

19. Workman slipping on curb of public highway in adjoining State while proceeding to place of work — injury not accidental or arising out of and in course of his employment, although there was agreement between labor organization and employers providing that workmen employed outside city district must be at limit of city district nearest to place of work as near eight o'clock as possible. *Keller v. Reis & Donovan, Inc.*, 45.

20. Injury sustained in fight initiated by employee engaged in "horseplay" does not arise out of and in course of employment. *Stein v. Williams Printing Co.*, 336.

21. Temporary lull in activities does not take employee out of course of employment. *Posey v. Moynahan*, 440.

HAZARDOUS EMPLOYMENT.

22. Chemical experiments carried on by school teacher, where such experiments are prescribed by Education Law, are not hazardous. *Beeman v. Board of Education*, 357.

23. Lumbering — barnman around headquarters of employer engaged in lumbering and who maintained boarding house is engaged in hazardous employment under group 14, section 2 — lull in activities of plant did not relieve insurance carrier. *Posey v. Moynahan*, 440.

WAGES.

24. Where weekly wages are twenty-two dollars a week, computation of compensation should be two-thirds of same, and not fifteen dollars. *Taft v. Champlain Silk Mills*, 917.

SPECIFIC SCHEDULE.

25. Fracture of lower end of bone of right leg followed by amputation of leg at middle of one-third of right thigh after discovery of existence of malignant bone cancer — cancer does not warrant award for loss of leg. *Brady v. Holbrook, Cabot & Rollins Corp.*, 74.

WORKMEN'S COMPENSATION LAW — Continued.

26. Commission may not disregard medical testimony as to proportionate loss of member and make award in excess of such proportionate loss as determined solely by deputy's examination. *Schemerhorn v. General Electric Co.*, 670.

27. Loss of fourth finger and loss of use of third finger — authority of Industrial Commission, after award under section 15 to increase award under section 74, sustained — payment of increased award should commence when first terminated. *Polucci v. Norris Co.*, 805.

DEPENDENCY.

28. Mother not dependent upon son at time of death where evidence shows receipt from husband and several children approximately of one hundred dollars per week, and that she owned two houses with an equity of several thousand dollars and had an income of approximately fifty-four dollars per week. *Hoffman v. Van Benthuyzen Co.*, 76.

NOTICE OR KNOWLEDGE OF INJURY.

29. Notice of claim must be filed by mother of illegitimate child within statutory period, and not by guardian — failure of mother to file within prescribed time fatal. *Grillo v. Sherman-Stalter Co.*, 362.

30. Commission should follow rules laid down by Court of Appeals and not treat provision as to notice as mere matter of form — failure to give notice should not be excused unless evidence shows that employer and insurance carrier were not prejudiced thereby — notice that employee is suffering from germ disease is not notice of accidental injury — requirements as to notice are conditions precedent to right to award. *Bizby v. Colswold Comfortable Co.*, 659.

31. Employer not prejudiced by failure of employee to give notice where insurance carrier was represented at hearing. *Quick v. Ilston Ice Co.*, 676.

32. Effect of 1918 amendment of law extending time for giving notice of injury. *Struzynski v. Smith Contracting Co.*, 945.

AWARD.

33. Limit of award is date fixed by physician of Commission, in absence of evidence to contrary. *Grunstick v. Schaefer & Son*, 334.

34. Informal proceedings for increase of award disapproved. *Pollucci v. Norris Co.*, 805.

PAYMENT.

35. Where award is properly increased under section 74 payment thereof should commence at termination of previous award. *Pollucci v. Norris Co.*, 805.

EVIDENCE AND PRESUMPTIONS.

36. Finding that injury caused disability for certain period held insufficient under established fact in case. *Grunstick v. Schaefer & Son*, 334.

37. Burden that disability did not extend beyond certain fixed date is on claimant and presumptions raised by section 21 have no application. *Grunstick v. Schaefer & Son*, 334.

38. Foreign certificates of births and marriages not evidence of relationship between decedent and alleged widow such as is required by Code of Civil Procedure. *Grillo v. Sherman-Stalter Co.*, 362.

39. Burden of proof — continuance of disability, burden of proof on claimant to show. *Nidds v. Sterling Ceiling & Lathing Co.*, 432.

40. Section 21 of Workmen's Compensation Law, relating to presumptions, was applicable to death from pulmonary tuberculosis following injury. *McGoey v. Turin Garage & Supply Co.*, 436.

41. Hospital records showing deceased was treated for hemiplegia on a prior occasion, where hospital authorities could give no account of how records were made, but stated that they were made from information acquired almost any way, are insufficient to prove similar attack. *O'Sullivan v. Woods Theatre Co.*, 609.

42. Same quality of evidence as to conduct of deceased is not required in death cases as in other cases. *O'Sullivan v. Woods Theatre Co.*, 609.

WORKMEN'S COMPENSATION LAW — Continued.

43. Workmen's Compensation Law relating to compensation for specific injury does not delegate to Commission power arbitrarily to determine proportionate loss of use of member, nor can such power be presumed in view of constitutional guarantees against arbitrary power in any department of government — proportionate loss of use of member seems to be question for determination by those having expert knowledge. *Schemerhorn v. General Electric Co.*, 670.

JURISDICTION OF COMMISSION.

44. Jurisdictional fact of contract of employment must be established by due process of law, mere scintilla of evidence not being sufficient. *Steels v. Paul Smith's Hotel Co.*, 39.

45. Commission has no power to set aside deliberate contracts of parties or close its eyes to terms and conditions of contracts — where contract constitutes claimant an independent contractor powers of Commission are at an end. *Svolos v. Marsch & Co.*, 674.

DISABILITY, CONTINUANCE, ETC.

46. Fact that claimant will not work while waiting for larger allowance does not justify finding that disability continues. *Grunick v. Schaefer & Son*, 334.

47. Burden of proof is on claimant to show continuance of disability. *Nidds v. Sterling Ceiling & Lathing Co.*, 432.

APPEAL AND REVIEW.

48. Appellate Division is not at liberty to interfere with findings of Commission that injury caused pneumonia where many circumstances corroborated opinion of experts. *Delso v. Crucible Steel Co.*, 288.

WRONGFUL DISCHARGE. I

See MASTER AND SERVANT, 2-4.

C.A.L.
1/9/22



